UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

STARBUCKS CORPORATION d/b/a
STARBUCKS COFFEE COMPANY

And

Case No. 2-CA-37548
2-CA-37599
2-CA-37606
2-CA-37688
2-CA-37689
2-CA-37798
2-CA-37821
2-CA-38187

LOCAL 660, INDUSTRIAL WORKERS
OF THE WORLD

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS

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Dated at New York, New York
This 8th Day of May, 2009

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STATEMENT OF THE CASE

A hearing in the above-captioned case was held before Administrative Law Judge Mindy E. Landow in New York, New York, over the course of 20 days between July 9 and October 25, 2007.

The ALJ issued, on December 19 2008, a decision[1] including Findings of Fact, Conclusions of Law and a Recommended Order. The ALJ found, in pertinent part, that Respondent Starbucks: (1) prohibited employees from discussing the Union while allowing other non-work discussions; (2) prohibited employees from discussing the union even while off duty; (3) discriminatorily prohibited employees at Respondent's Union Square East store from using a company bulletin board to post items of a non-work nature, including materials relating to the Union; (4) discriminatorily prohibited off-duty employees employed at Respondent's Union Square East store from entering the back of the store; (5) implemented and enforced a policy prohibiting employees from wearing more than one pro-Union button at any given time; (6) promulgated and maintained a rule prohibiting employees from talking about the Union while allowing other non-work-related discussions; (7) promulgated and maintained a rule prohibiting employees from talking about terms and conditions of employment; (8) discriminatorily disciplined Tomer Malchi pursuant to an unlawful rule prohibiting employees from talking about the Union while allowing other non-work related discussions; (9) discriminatorily prevented Malchi from working shifts at other Starbucks locations; (10) discriminatorily issued

[1] "ALJD," followed by a number and then a colon and another set of numbers refers to the page number and line number, respectively, of the Administrative Law Judge's Decision. "Tr." Followed by a number indicates the page of the official transcript. "Resp. Br.", followed by a number indicates the pertinent section or sections of the Respondent's Brief in Support of Exceptions. "G.C. Ex." and "Resp. Ex." Refer to General Counsel's and Respondent's exhibits, respectively.

negative employment evaluations to Daniel Gross on January 29, April 14, April 29 and August 5, 2006; (11) discriminatorily issued a written warning to Daniel Gross on August 5, 2006; (12) discriminatorily discharged Joseph Agins, Jr on December 12, 2005; (13) discriminatorily discharged Daniel Gross on August 5, 2006; and (14) discriminatorily discharged Isis Saenz on October 26, 2006.

The ALJ ordered an appropriate remedy, including an order to cease and desist from committing any of the acts found to constitute unfair labor practices, to rescind all of the unlawful work rules, to expunge from its files any unlawful discipline or reference to that discipline, to make whole the employees who received unlawful discipline or who were discharged for any loss of earnings and other benefits, and to post an appropriate Notice.

Respondent has excepted to the findings and conclusions with respect to only four of the unfair labor practices found by the ALJ: (1) the discriminatory discharge of Agins; (2) the discriminatory discharge of Agins; (30 the discriminatory discharge of Gross; and (4) the unlawful policy prohibiting the wearing of more than one pro-union button.

POINT 1. The ALJ Correctly Held That Respondent Violated Section 8(a)(1) by Promulgation and Enforcement of its One-Button Rule.

A. Facts Regarding the One-Button Rule

Promulgation and Enforcement of One-Button Rule.

Prior to March 7, 2006, Respondent refused to allow its employees to wear any Union buttons while at work (Tr. 334-335, G.C. Ex. 44). The IWW filed an unfair labor practice charge alleging various unfair labor practice violations including the Respondent's prohibition against the wearing any union buttons by its employees. On or

about March 6, 2006, Starbucks reached a settlement with the NLRB on the complaint that was pending against them. On or about March 7, 2006, Respondent revised its policy on union pins nationally whereby employees where allowed to wear union buttons while at work (Tr. 335, 360, 2649-2650 G.C. Ex. 44).[2]

The revised pin policy states as follows:

> **Pins**
>
> Partners are not permitted to wear buttons or pins that advocate a political, religious or personal issue. The only buttons or pins that will be permitted are those issued to the partner by Starbucks for special recognition or advertising a Starbucks-sponsored event or promotion; and reasonably-sized and placed buttons or pins that identify a particular labor organization or a partner's support for that organization, except if they interfere with safety or threatened to harm customer relations or otherwise unreasonably interfere with Starbucks public image (Resp. Ex. 65, p. 17).

Subsequently, Respondent began to limit the number of union buttons employees could wear while at work. In late March 2006, a week or two after the settlement, District Manager Will Smith approached employee Peter Montalbano[3] at work and asked him to the back room (Tr. 1524-1525). While in the back, Smith told Montalbano that he wanted to go over the settlement with him (Tr. 1525). Smith read the settlement to Montalbano (Tr. 1525). Smith also informed Montalbano that management had implemented a new policy on pins. Smith told Montalbano that he was only allowed to wear one union pin while at work (Tr. 1525).

During this conversation, Montalbano was wearing two union pins.[4] One was on his hat and the other on his apron (Tr. 1526-1527). Montalbano responded that there wasn't any language in the settlement that restricted the number of union pins worn by an

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[2] Respondent subsequently revised is employee handbook to reflect this new policy (Resp. Ex. 65).
[3] Peter Montalbano has been employed as a Barista at Starbucks since September 28, 2004 at the store located at 145 Second Avenue (Tr. 1470).
[4] There are a couple of instances when employees came to work wearing more than two pins on their uniform (Tr. 2509-2510).

employee (Tr. 1525). Montalbano and Smith reviewed the language in the settlement (Tr. 1526). Montalbano pointed out to Smith that the settlement stated "union pins" which was plural. Montalbano maintained that there was nothing in the settlement agreement that limited the number of union pins one could wear. Smith responded someone would get back to Montalbano on this issue. He did not order Montalbano to remove a pin (Tr. 1526).

A couple of days later, Montalbano arrived to work for an evening shift (Tr. 1527). He clocked in and then put on two of his union pins (Tr. 1528). He wore one on his hat and the other on his apron (Tr. 1572, 1576-1577, G.C. Ex. 26 &27). One pin was an IWW membership pin, about an inch in diameter (TR. 660, 1576-1577, G.C. Ex. 26 & 27). The other pin was a little bigger, about 7/8th of an inch in diameter (TR. 660- 661, 1576-1577, G.C. Ex. 26 & 27). Both pins were red and contain the letters, IWW (TR. 660, 1576-1577, G.C. Ex 26 & 27).

Assistant Store Manager Richard Wood approached Montalbano in the café and said, "Peter, I'm going to have to ask you to bust it down to one pin" (Tr. 1527-1528, 1576-1577, G.C. Ex. 26 &27). Montalbano and Wood walked to the back room. While in the back room, Wood explained that he had attended a manager's meeting and was told the new policy was that workers were only allowed to wear one union pin (Tr. 1529). Consequently, Montalbano removed the union pin that was on his hat (Tr. 1572, G.C. Ex. 26). He kept the pin on his apron on (Tr. 1572, 1576-1577, G.C. Ex. 27).

Employee Tomer Malchi[5] often wore two union pins to work. He would wear them on his collar, hat or apron (Tr. 660-661, 665). One pin was an IWW membership pin and the other pin was the Centennial pin (TR. 660- 661, 1590, G.C. Ex. 26 & 27).

On one occasion in the fall of 2006, Malchi wore two union pins while at work. District Manager Tracey Bryant told him that he could only wear one pin. Malchi argued with her that the settlement from March 2006 stated that the employees were allowed to wear union pins, which were plural (TR. 666). Bryant responded that either he take one pin off or be sent home (TR. 666). Consequently, Malchi took one of the pins off (TR. 666). Malchi testified he had these types of run-ins with Bryant and Store Manager Cynthia Alecia on several occasions throughout the fall of 2006 (TR. 666).

On one occasion after the settlement, employee Charles Fostrom[6] wore the two union pins referred to as Centennial pins to work (Tr. 1590, G.C. Ex. 27). He wore one on his hat and the other on his apron (Tr. 1590, G.C. Ex. 27). Store Manager Patrice Britton saw the union buttons and ordered Fostrom to take one of the pins off (Tr. 1352, 1590). Britton told Fostrom that Starbucks policy allows partners to only wear one union pin (Tr. 1590). Fostrom responded that McDermet had signed the settlement that allowed employees to wear union pins, meaning plural, while on the clock (Tr. 1590). Fostrom explained to Britton that meant he got to wear more than one union pin (Tr. 1590). Fostrom then showed Britton the settlement documents (Tr. 1591, G.C. Ex. 44). Britton replied, "Those rules don't apply here. This is my store. We run it my way" (Tr. 1591).

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[5] Tomer Malchi was employed by Starbucks as a Barista at the store located at 15 Union Square East from April 2005 to July 3, 2007 (Tr. 515-516).

[6] Charles Fostrom worked as a Barista for Starbucks at the store located at 116 E. 57th Street from July 2004 to July 2006 (Tr. 1579).

Employees Wear Multiple Starbuck Issued Pins.

Many of the baristas at Starbucks wear multiple pins issued by Starbucks on their hats and aprons (Tr. 646, 650, G.C. Ex. 24A-E). These pins include "mug award" pins and "barista certification" pins (G.C. Ex. 11 p. 27). Any employee can give another employee a "mug award" pin as a reward for providing good service or for cooperating with a fellow worker (Tr. 651-652). Malchi has given several coworkers and managers "mug award" pins (Tr. 713). A "barista certification" pin is given to an employee upon completion of his/her coffee training (Tr. 651). Only managers issue "barista certification" pins to employees (Tr. 652).

Store Manager Jose Lopez admitted that there is no limit on the number of mug award pins, green apron pins or barista certification pins a partner can wear (Tr. 199, 204, 206-207). Many Baristas wore multiple Starbucks issued pins on their hats and aprons (Tr. 200, G.C. Ex. 24a-e). Lopez has observed baristas wear more than five mug award pins at one time (Tr. 200).

Montalbano testified that he wears a baseball hat issued by Starbucks as part of his uniform (Tr. 1530). Montalbano has eight pins on his hat (Tr. 1530). The eight pins are company issued performance pins; five were Mug award pins given to him by employees and the three other pins[7] were issued by managers (Tr. 1530-1531, 1532).

B. Argument

i. The ALJ Correctly Held that Respondent Violated Section 8(a) (1) of the Act by Promulgation and Enforcement of its One-button Rule.

Respondent argues that the Administrative Law Judge ("ALJ") erred by concluding that there was no special circumstances that justified Starbucks' one-button

[7] Montalbano testified that one of the pins awarded to him was called a five star legendary service pin. He was awarded this pin for having a good snapshot (Tr. 1531).

limitation and that the ALJ erred by failing to balance an employee's right to wear union insignia with Starbucks' right to manage its business. Specifically, Respondent argues that the ALJ erred by 1) failing to find that the Respondent's one-button rule was promulgated to ensure that employees present a "clean, neat and professional" image; and by 2) failing to distinguish between employer issued pins versus non-employer outside pins (Resp. Br. 23). Respondent's arguments lack any substance.

a. Respondent failed to demonstrate that there were "special circumstances" justifying the promulgation and enforcement of its one-button rule.

It is well established that employees have a right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). But this right is not without limitation. The Board must balance the conflicting rights of employees under Section 7 and the right of employers to manage their businesses safely and efficiently. *Id.* at 797-798; *Standard Oil Co. of California*, 168 NLRB 153 (1967). An employer may not lawfully restrict employees from displaying or wearing union insignia at work unless it demonstrates the existence of special circumstances and if those circumstances outweigh the adverse effect on employee' Section 7 rights resulting from the limitation or ban. *Pathmark Stores, Inc.,* 342 NLRB 378, 379 (2004); *Albis Plastics*, 335 NLRB 923, 924 (2001).

The Board has held that it will find "special circumstances" justifying a ban on union insignia where the employer has demonstrated that the display of insignia may unreasonably interfere with the public image that the employer has established, as part of its business plan, through appearance rules for its employees. *Nordstrom, Inc.,* 264 NLRB 698, 700 (1982). The Board has held that the wearing of a union pin free of

offensive messages and language does not in any meaningful way interfere with the employer's effort to create the desired image of neatly uniformed employees. *United Parcel Service*, 312 NLRB 596 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). The Board has also consistently held that customer exposure to union insignia, standing alone, does not constitute "special circumstances". *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484 (1962), enfd. as modified on other grounds 318 F.2d 545 (5th Cir. 1963).

The employer bears the burden of proving such special circumstances. *Pathmark Stores, Inc.,* supra. Absent such "special circumstances", the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8 (a)(1) of the Act. *Republic Aviation Corp.*, supra.

The record establishes that employees were not allowed to wear two union pins, each less than one inch in diameter, and which merely bore the acronym "IWW" in white letters against red backgrounds, on their uniform while at work (G.C. Ex. 26 & 27). On several occasions, when employees wore these two union pins to work, they were instructed by a manager to remove at least one button (Tr. 666, 1527-1528, 1572, 1590). Starbucks, however, allows employees to wear multiple other pins on their uniform (Tr. 204-206; 646, 650-652, 1530-1532, G.C. Ex. 11, 24A-E).

Respondent, now, belatedly, asserts that it prohibits employees from wearing two union buttons while at work because of its interest in creating a neat, clean and professional image appropriate of a retailer of specialty gourmet products (Resp. Br. 23). The ALJ, however, correctly found that the image conveyed by Starbucks by allowing employees to wear multiple Starbucks issued pins all at one time (See G.C. Ex. 24A-E) was not consistent with a "neat, clean and professional" image. The ALJ correctly found

that Starbucks did not, in fact, convey a "neat, clean and professional" image to the consumers. Rather, it conveyed merely the image of an employee wearing a variety of pins on their hats and aprons to the consumers (ALJD 15: 19-28). As such, the ALJ correctly found that since Respondent did not view this image as contravening the image which it desired to present to the public, Respondent could not argue that the wearing of two union buttons at one time by its employees as contravening this image either (ALJD 15:19-28). As the ALJ noted, the IWW buttons are no more conspicuous in size or design than the Starbuck issued pins (ALJ 14: 8-9).

At trial, none of Respondent's witnesses asserted that the one button policy was based on the dress code policy of having a "neat, clean and professional" image. Nor did any witness who testified on behalf of Respondent explain how wearing two union buttons would negatively affect such an image. Rather, Regional Vice President Jim McDermet simply offered testimony that the pin policy was based on a conversation he had with Counsel for the General Counsel in March 2006 during a settlement conference involving then pending unfair labor practices and he vaguely referenced the dress code (Tr. 334).[8] Thus, the ALJ correctly found that the one-button rule was not promulgated as an extension of Respondent's dress code policy or any other basis, for that matter (ALJD 15: 13-31).

The ALJ cited *Serv-Air, Inc.*, 161 NLRB 382 (1966) as support for finding that the one button rule violated the Act (ALJD 15: 42-50). In that case, during a union

[8] McDermet testified that during the 2006 settlement conference he discussed what was acceptable in terms of the union pin because he thought it would be the type of thing managers would need to manage in term of the dress code. But he did not mention what image Starbucks intended to convey to its customers and did not address the question of how the wearing of two union pins adversely affect the image that it was, in fact, conveying to its customers (Tr. 334). This is also true of Store Manager Jose Lopez' vague testimony describing the pin policy as a dress code policy (Tr. 210).

organizing campaign, employees of a private contractor at Vance Air Force began wearing multiple badges and pins at one time indicating their support for the union. The Employer limited the employees to wearing only one button at a time citing several reasons as a basis for the rule. First, the employer claimed that wearing multiple buttons was a safety hazard. Second, the employer stated its goal of maintaining the appearance of a responsible working organization to its customer, the United States Army. Third, the employer claimed that the rule would limit disharmony among all the employees. *Id.* 402. The Board in adopting the Trial Examiner's recommendations rejecting all of the employer's stated reasons for the rule and found the employer's rule prohibiting an employee from wearing more than one union button at time was a violation of Section 8 (a) (1) of the Act.

Respondent argues that the ALJ's reliance on *Serv-Air, Inc.* was misplaced because the employer argued safety and product concerns as a basis for its one button rule (Resp. Br. 25). Respondent's argument is without merit. The facts in *Serv-Air, Inc.* are virtually identical to the case herein. In the case herein, during the course of an organizing campaign, the employees began to wear multiple buttons at one time. In response, Respondent promulgated and enforced a one-button rule. The Board in affirming the Trial Examiner's decision in *Serv-Air, Inc.*, relied on evidence that showed the employees wear permitted to wear various other adornments. It reasoned that the employer's rationale for not allowing its employees to wear multiple union buttons was undermined by the fact that employer allowed its employees to wear a variety of other adornments. The same analysis applies to Starbucks' proffered reason for limiting its employees to wearing one union button. The record establishes that the employees at

Starbucks are permitted to wear multiple pins and buttons (referred to as mug award pins, green apron pins or barista certification pins) on their hats and aprons at one time (Tr. 204-207, 646, 650-652, 1530-1532, G.C. Ex. 11, 24a-e). There are no limits on the number of Starbucks-issued pins a partner can wear (Tr. 199, 204-207, G.C. Ex. 11, 24a-e). Even assuming that the Respondent had a real interest in creating a "neat, clean and professional" image as it claims, Respondent is hard-pressed to argue that the two IWW buttons at issue "unreasonably" interfere with this image when it encourages its employees wear pins and buttons of other types all at one time.

Respondent asserts that the Board has made a distinction between employer-sponsored pins versus pins that are not employer-sponsored when evaluating whether a prohibition on wearing union buttons qualifies as "special circumstance" (Resp. Br. 24). Respondent is mistaken. Rather, the Board has consistently found that whether the pin is employer issued or is not employer-sponsored is not the key distinction.[9]

In *Nordstrom, Inc.*, supra, 264 NLRB at 702, the employer sought to prohibit the steward from wearing a steward pin, which merely bore the designation "steward", while at work. The employer asserted, among other things, the need to preserve the public high fashion image of its selling floor employees. The Board adopted the ALJ's decision finding that the employer allowed varied-albeit tasteful and fashionable-dress and personal jewelry to be worn by its selling floor employees. The ALJ reasoned that since the employer allowed the employees to wear different types of adornments and varied

[9] *Claremont Resort & Spa*, 32-CA-19833/JD (ATL)-39-03, (June 6, 2003), an ALJ decision of no precedential import, cited by Respondent, is nonetheless distinguishable from the instant case. In that case, the employer refused to allow employees to wear a union button and an additional orange-yellow ribbon, on their uniforms at the same time. The ALJ found that the employer had proven special circumstances in prohibiting its employees from wearing the ribbon because it found that the ribbon was roughly four times larger, more colorful and more conspicuous than the union button. Further, the ALJ found the ribbon bore no indicia of its purpose and thus, invited inquiry from customers.

dress, it could not now argue that no steward pin could be worn, since it was small, tasteful, and inconspicuous[10] and would not unreasonably interfere with the employer's operation.

Conversely, in *Con-Way Central Exp.*, 333 NLRB 1073 (2001), cited by Respondent, the Board adopted the ALJ's finding that the employer did not violate Section 8(a)(1) by prohibiting employees from wearing union buttons. But in that case, the ALJ found that the union buttons highly conspicuous, were two and a quarter inches in diameter, came in one of four "day-glow" colors and carried five renditions in black capital letters of the words, "Vote Teamsters".[11]

A closer look at *W. San Diego,* 348 NLRB 372 (2006), a case cited by Respondent, demonstrates that the employer was able to establish "special circumstances" justifying a ban of union buttons because it limited the number of **any** type of button worn by employees. In *W. San Diego,* the employer, an upscale hotel, refused to allow employees to wear a 2-inch square union button containing the language "JUSTICE NOW! JUSTICIA AHORA! H.E.R.E. Local 30" because it detracted from the "trendy, distinct and chic look" image it wanted its employees to convey. The employer only allowed the employees to wear **one** company-issued pin, ½ inch "W" pin, which stood for the "Wonderland" ambiance the employer hoped to achieve. The Board found the union button was too large, too controversial and interfered with the "trendy, distinct and chic look" that the employer wanted to present to the public. Further, the Board

[10] The ALJ described the pin worn as muted in tone, discrete in size, and free from provocative slogans or mottos. *Nordstrom*, supra, 264 NLRB at 701.

[11] Similarly, in *United Parcel Service*, 195 NLRB 441 (1972), another case cited by Respondent, the Board found that the white union campaign button at issue, which was 2 ½ inches in diameter with the legend in red reading, "Vote Jack Ryan Local 294", was too large and conspicuous.

noted that the ½ inch "W" pin the employer required the employees to wear as part of its uniform was small and that the employer limited this requirement to **one** pin.

Unlike in *W. San Diego*, Starbucks allows employees to wear multiple buttons and pins. As the ALJ found, the image Starbucks presented to its customers was that of an employee wearing a variety of pins on their hats and aprons. Consequently, the wearing of two small size union pins do not interfere with this image in light of the fact that Starbucks already allows employees to wear multiple pins of other types on their uniform (Tr. 204-206; 646, 650-652, 1530-1532, G.C. Ex. 11, 24a-e).

Respondent contends that the ALJ erred by finding that the settlement agreement did not limit the number of union pins an employee could wear (Resp. Br. 21, n. 4). As noted by the ALJ, the settlement agreement contains no apparent or implied limitation to one pin per employee per shift (ALJD 15: 4-11). The March 2006 settlement agreement, uses the terms "buttons" and "pins" in the plural tense (G.C. Ex. 44).

Moreover, the terms of Respondent's own revised pin policy did not limit the number of union pins an employee was permitted to wear (Resp. Ex. 65, p. 17). The revised pin policy uses the terms "buttons" and "pins" in the plural tense (Resp. Ex. 65). The only limitations specifically outlined in the revised pin policy are the buttons must be "reasonably-sized" and cannot "unreasonably" interfere with Starbucks' public image. Thus, based on the language in Respondent's own policy, wearing two reasonably-sized union buttons does not unreasonably interfere with its public image. The ALJ correctly found that the Respondent's settlement agreement and revised pin policy did not limit the number of union pins an employee could wear to one button. (ALJ 15: 4-11).

The Respondent also argues that the ALJ erroneously found that the one-button rule was overbroad in that it applied to employees who were actively working, on break or in non-customer areas. (Resp. Br. 26) The record establishes that Respondent did not limit its one-button rule to public areas of its stores. McDermet simply testified that Starbucks had a national policy which limited the employees to wearing only one pin (Tr. 332-335). The record establishes that when employees were admonished about wearing two union buttons, managers simply told them that the new policy was that workers were only allowed to wear one union pin (Tr. 660-666; 1525-1529; 1590-1591). There was simply no clarification or limitation in the rule's reach. Nor did Respondent at any time either orally add such a limitation to its rule or limit its enforcement of the rule to employees working in public areas of the facility. Consequently, Respondent's one-button rule was overbroad. The ALJ correctly found that the rule applied unambiguously to both public and nonpublic areas of Respondent's store. (ALJD 15: 33-36)

Respondent additionally claims that the ALJ failed to properly balance Starbucks' right to manage its business by promulgating the one-button rule and the claimed adverse affects on the employees section 7 rights (Resp. Br. 20). Respondent claims had the ALJ conducted a proper analysis, she would have noted that the one-button rule did not adversely affect employees because they had unrestricted right to express support for the union since employees regularly leafleted outside the stores; staged actions within the store to express their union affiliation; and handed out buttons to co-workers while on the clock (Resp. Br. 20). The issue in this case is not whether the employees could express their Section 7 rights in other manners. Rather, the issue is whether the employer has met its burden in proving special circumstances that justify its rule restricting employees from

displaying or wearing union insignia at work and if those circumstances outweigh the adverse effect on employee' Section 7 rights resulting from the limitation or ban. *Pathmark Stores, Inc.,* 342 NLRB 378, 379 (2004). As stated above, Respondent has failed to demonstrate any special circumstances that require prohibiting employees from wearing two union buttons.

Moreover, Respondent's assertion that the employees had unrestricted right to express their union support in a variety of ways is grossly inaccurate. In fact, the ALJ found and the record supports the finding that employees were repeatedly restricted in expressing their support for the union. In the case herein, the Respondent prohibited employees from talking about the union while at work (ALJD 19-24); terminated employee Isis Saenz after leafleting outside a Starbucks store (ALJD 52-57); issued a warning to employee Tomer Malchi after he talked to borrowed partner Aisha Mumford about the union and handed her a union pin (ALJD 31, 33-34); and terminated Joe Agins after he engaged in a button action (ALJD 42-52). The record makes clear that the employees were constantly facing restrictions by Starbucks when they attempted to express support for the union.

POINT 2. The ALJ Correctly Held that Respondent Violated Section 8(a)(1) and (3) of the Act by Discharging Saenz.

A. Facts Regarding the Discharge of Saenz

Saenz Announces her IWW Membership.

Isis Saenz worked at Starbucks as a Barista at the store located at 116 East 57th Street, New York, N.Y. (TR. 1349). She began working for Starbucks in the summer of 2005 (TR. 1349). In or about March 2006, Saenz joined the IWW (TR. 1350, 1583). After Saenz joined the Union, she attended union meetings and fundraisers held by the

IWW (TR. 1351). In June 16, 2006, Saenz announced her union affiliation to District Manager Veronica Park, Store Manager Patrice Britton and her coworkers (Tr. 1351-1352, 1355-1596). She and coworker Charles Fostrom also drafted a letter listing their concerns regarding the working conditions at the store (Tr. 1592, G.C. Ex. 45). They presented the list of demands with the signatures to Britton that day but he refused to accept it (Tr. 1353-1354, 1594, G.C. Ex. 45).

Saenz Pickets at the Starbucks located on 29th Street and Park Avenue.

On or about October 26, 2006, the IWW held a rally in front of the Starbucks located at 29th Street and Park Avenue. Howard Schultz, the CEO of Starbucks, was scheduled to visit the store in support of a book promotion that evening (Tr. 1367, 1601). That evening, approximately fifteen IWW members and supporters including Saenz gathered at a nearby coffee shop and walked over to the Starbucks at 29th and Park Avenue (Tr. 1366, 1408, 1542). Saenz was not scheduled to work that day and has never worked at that location (Tr. 1403). Present inside the store were McDermet and District Manager Tracey Bryant (1369, 1542). In addition, there was a store manager (unnamed) and some Starbucks corporate employees present at the store that evening (Tr. 337, 1602, 1636, G.C. Ex. 50).

The IWW members and supporters began chanting, "What's disgusting? Union Busting! What's outrageous? Starbuck wages!" (Tr. 1369, 1408, 1602, 1637, G.C. Ex. 50). The group also sang the song, 'Solidarity Forever' (Tr. 1369, 1408, 1602). They held posters, which had the IWW Starbucks Workers Union logos on them (Tr. 1369, 1408, 1602). Saenz testified some of the posters read, "We won't accept poverty

paychecks" and "Stop union busting" (Tr. 1366). The IWW members and supporters also distributed leaflets to passersby (Tr. 1366, 1408).

According to McDermet, while he was inside the store, he did not hear anything other than chanting by the group (Tr. 341). While McDermet was inside the store, one of the demonstrators outside stated, "Hello, Jim. We have a surprise for you?" and "Don't touch him. Spit on him!" (Tr. 1681, 1693-1694, G.C. Ex. 50). Fostrom testified that he believed Saenz made those comments and that she was referring to McDermet (Tr. 1681, 1693-1694, G.C. Ex. 50).[12] McDermet was in the store at the counter at the time these comments were made and admitted that while in the store, he did not hear Saenz direct any comments at him (T. 341, 1711).[13]

At one point during the evening, IWW member Damian Schroeder entered the store and began a conversation with McDermet about the book reading and other related matters (Tr. 1410). Schroeder later exited Starbucks and rejoined the people at the rally (Tr. 1410).

McDermet left the store at around 8:30 p.m. (Tr. 341, Tr. 1369). Fostrom overheard Gross tell everyone, "Don't touch him. Don't touch him" as McDermet walked out the store (Tr. 1603). The IWW members began chanting, "Shame, Shame, Shame" when McDermet exited the store (Tr. 1369, 1543, 1602). Fostrom faced the door and was approximately five feet to the left of the entrance while videotaping the scene with

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[12] G.C. Ex. 50 contains the voice of an individual stating, "Piss on him." Charles Fostrom testified that Saenz was not the individual who uttered that comment (Tr. 1693).

[13] Saenz was never asked about those comments during her termination interview or when she testified during the hearing. It appears that Respondent was not even aware of those comments until the hearing. Moreover, Respondent did not rely on those utterances as the basis for making its decision to terminate Saenz.

his video camera (Tr. 1603, G.C. Ex. 50).[14] Fostrom asked McDermet why had he fired him (Tr. 1603).

After McDermet exited the store, he made a turn on 29th Street (Tr. 1369, 1411). Approximately six protestors followed McDermet as he walked, including Saenz, Fostrom, and Schroeder (Tr. 1391, 1411, 1544, 1605-1606, 1970). The group walked approximately six feet behind McDermet (Tr. 1396). As McDermet walked down 29th Street towards Park Avenue, Saenz stated, "Jimmy, Jimmy, why won't you speak to us? Why are you ignoring your workers?" (Tr. 1303, 1370, 1394). McDermet admitted that all he heard Saenz say was, "Jimmy, Jimmy, why won't you talk to us", "Jimmy spend some time with us, Jimmy" (Tr. 342-343).[15] McDermet doesn't recall her saying anything else (Tr. 343).

While McDermet walked down 29th Street, Fostrom continued to videotape and asked McDermet questions (Tr. 1371, G.C. Ex. 50). Halfway down 29th street, a man and woman joined McDermet (Tr. 1412, 1605). Fostrom asked McDermet whether he was involved with the campaign to get rid of the union at Starbucks (Tr. 1396, 1604). The group of six members chanted part of the way, "What's disgusting? Union busting. What's outrageous? Starbucks wages" (Tr. 1372, 1397). A male individual yelled, "I know where you live" as they walked between Park and Madison (Tr. 1607, G.C. Ex. 50). This individual was not an IWW member or part of the group of supporters (T. 1306, 1607). Fostrom described this individual as a "kid" with baggy pants who just

[14] Fostrom did not edit any of the videotape recordings during the process of transmitting the recording from the video camera to the DVD (Tr. 1632). He testified that he made no cuts or enhancements to the content of the videotape recording (Tr. 1632).

[15] The videotape recording establishes that an individual stated, "Come on. Come on, Jimmy" and Fostrom testified that it was Isis Saenz who uttered those words (Tr. 1639, G.C. Ex. 50). The videotape recording also establishes that an individual stated, "Hello, Jim. We have a surprise for you?" (Tr. 1681, G.C. Ex. 50). Fostrom testified that he believed that Isis Saenz was the person who uttered those words (Tr. 1681).

came up off the street (Tr. 1607, 1640). Employee Sarah Bender[16] also observed an individual she described as a loud street kid join the picket (Tr. 1306). Bender testified that "this kid got a kick out of yelling things" (Tr. 1306). None of the Union members knew this individual (Tr. 1306, 1607).

The chanting stopped prior to the small group reaching Madison Avenue (Tr. 1605). When McDermet reach Madison Avenue, he made a left turn and continued walking (Tr. 1371, 1412). Consequently, the small IWW group made a left turn and continued to walk behind McDermet on Madison towards 28th Street (Tr. 1371, 1412, 1638, G.C. Ex. 50). Fostrom and Saenz also crossed the street and continued walking on Madison Avenue. However, prior to reaching the corner of 28th Street, Fostrom and Saenz decided to turn back (Tr. 1371, 1412, 1606, 1638, G.C. Ex. 50). At that point, Saenz yelled to McDermit, "See you next time, Jim" (Tr. 1371). At this point, Fostrom stopped videotaping (Tr. 1638). After Fostrom and Saenz broke away from the group, approximately four people continued following McDermet (Tr. 1412). Saenz and Charles returned to the Starbucks store (Tr. 1371-1372, 1412). Fostrom continuously taped what was happening from the time McDermet exited the store to the time he decided to stop following McDermit on Madison between 28th and 29th Street (Tr. 1608, 1712, G.C. Ex. 50).

McDermet testified that he continued walking (Tr. 344-345). He admitted that by the time he arrived at Madison Square Gardens/ Penn Station, only two or three IWW supporters were left and Saenz was not among them (Tr. 344, 345). McDermet testified that he was engaged in conversation with the two remaining protesters and that they discussed a number of things during their walk (Tr. 345). One of the remaining

[16] Sarah Bender was employed at another Starbucks location and was off-duty the night of the protest.

protestors was IWW supporter Schroeder (Tr. 1412-1413). McDermet filed a police report the day after the rally (Tr.346). Although he names some of the protestors, McDermet failed to specifically identify the individual who made the "I know where you live" comment in his police report (Resp. Ex. 42).

Starbucks Discharges Saenz.

Sometime after the protest, McDermet told Wilk his version of the events that had taken place during the protest (Tr. 481). McDermet told Wilk that the protestor's taunted him (Tr. 483). Wilk then told Park and Britton what had happened (Tr. 485).[17] Wilk told Park that Saenz was part of a group that taunted and teased Jim McDermet; that Saenz called McDermet, "Jimmy, Jimmy"; and that members of the group teased him saying they knew where he lives (Tr. 2081, 2092). Wilk recommended the termination of Saenz (Tr. 486) Park agreed (Tr. 486). Park met with Saenz five days after the rally (TR. 2084, 2093).

On or about November 1, 2006, Saenz returned to work[18] at her store (Tr. 1373). When she arrived to work that day, Britton informed her that Park wanted to talk with her downstairs (Tr. 1372). Saenz went downstairs. Park and Joyce Varino, Partner Resource Manager, were in the room waiting for here. Park informed Saenz that she needed to ask her a few questions (Tr. 1373). Park asked Saenz whether she had attended a rally at Starbucks located at 29th Street and Park Avenue on October 26th. Saenz answered in the affirmative. Park asked Saenz whether she had referred to McDermet as "Jimmy, Jimmy" in a disrespectful or demeaning way (Tr. 1373). Saenz denied referring to McDermet in a

[17] Park testified that Britton was not consulted about the termination since the incident did not occur at his store. She testified that under those circumstances a store manager would not be consulted regarding the decision to discharge. It would be the district manager's responsibility (Tr. 2094-2095).

[18] Saenz had been sick and hospitalized for a few days after the rally and this was her first day back to work (Tr. 1373).

disrespectful or demeaning manner. Saenz also denied saying "Jim, we know where you live (Tr. 2097). Park did not ask Saenz about any other comments directed at McDermet during the rally (Tr. 1372-1373, 2091-2097).

Park then asked whether the group could have intimidated McDermet and how would Saenz have felt if she was in his situation (Tr. 1373). Saenz responded that McDermet might have felt intimidated but that she didn't believe she would have felt that way (Tr. 1373, 2097). Saenz further stated however that if she were in McDermet's shoes, she would never have let it get to the point were workers had to whole a rally to get her attention (Tr. 1374). Park then informed Saenz that she was being terminated for being disrespectful to McDermet which was against Starbucks Guiding Principles (Tr. 1374). Shortly thereafter, Saenz left the store (Tr. 1374-1375).

Park testified that it was solely her decision to discharge Saenz (Tr. 2095). Park did not meet with any other individuals, including McDermet, to discuss the incident (Tr. 2093).

B. Argument

i. The ALJ Correctly Held that Saenz' Conduct Did Not Cause Her To Lose the Protection of the Act.

Respondent claims that the ALJ improperly concluded that (1) the location of Saenz' conduct weighed in favor of finding that her conduct was protected (Resp. Br. 51-54) and (2) the nature of Saenz' conduct similarly weighs in favor of finding that her conduct was protected (Resp. Br. 54-57). However, Respondent's arguments constitute misapplications of the applicable legal precedent.

a. Respondent Applies *Atlantic Steel* to the Wrong Conduct.

Respondents arguments are rooted in two mistaken conceptions regarding the proper application of *Atlantic Steel*, 245 NLRB 814 (1979). First, Respondent improperly considers conduct by Saenz which did not form any part of the grounds for her discharge by the Employer (Resp. Br. 55-57). Second, the Employer inappropriately broadens the concept of Saenz's conduct to include the acts of others (Resp. Br. 55-57). Neither of these maneuvers has any legal basis and the Board should reject the Employer's attempts to rewrite settled legal precedent.

The first mistake of Respondent is embodied in its claim that "Starbucks [sic] knowledge of [certain statement attributed to Saenz] is irrelevant to whether the nature of Saenz's remarks weighs against protection[] and...improperly injects motivational considerations into the ALJ's *Atlantic Steel* analysis" (Resp. Br. 56 n.15.) This statement misapprehends the role of the *Atlantic Steel* test.

It is a well-settled principle of Board law that every 8(a)(3) violation involves at least two substantive elements: discrimination and motive. *E.g., KFMB Stations*, 343 NLRB 748, 752 (2004). This is true even when an *Atlantic Steel* analysis is applicable; that analysis simply recognizes, as an evidentiary matter, that *proof* of motive is unnecessary in certain kinds of cases. "The *Wright Line* analysis would only be necessary to resolve a case alleging a violation which turns on *disputed* motivation." *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (emphasis added). In *Atlantic Steel* cases, the General Counsel need not adduce evidence regarding an employer's reasons for disciplining or discharging an employee because those reasons are undisputed. Thus, when an employer admits to disciplining or discharging an employee for conduct which

constitutes protected activity, the employer violates the Act unless the employee lost the protections of the Act *during the course of that conduct.* When an "employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act." *Alton H. Piester, LLC*, 353 NLRB No. 33, slip op. at 5, fn. 30 (2008) *quoting Consumer Power Co.*, 282 NLRB 130, 132 (1986)); *see also Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn.2 (1994).

In the present case, an *Atlantic Steel* analysis is appropriate because there is no dispute as to why *in fact* the Employer fired Saenz. The Employer's own witness, Veronica Park, testified that (i) she alone made the decision to fire Saenz, (Tr. 2095); (ii) she made the decision to terminate Saenz entirely on what Saenz told her, in light of what Traci Wilk had told her earlier about the demonstration at 29 St. and Park Ave. in which Saenz participated, (Tr. 2096); (iii) Wilk told Park only that Saenz had "teas[ed] and "taunt[ed] [McDermet] by calling him Jimmy," been part of a group that followed McDermet, and been part of a group which included someone who had said "We know where you live," (Tr. 2091–2092); and (iv) Saenz denied to Park that she said "we know where you live," (Tr. 2097). No other evidence in the record contradicted that testimony in any respect, nor has the General Counsel disputed Veronica Park's reasons for discharging Saenz. The ALJ therefore properly accepted Park's account of the Employer's *motive* in firing Saenz (ALJD 56: 26-31).

The ALJ also properly rejected as irrelevant alleged conduct[19] of which the Employer was unaware at the time it decided to discharge Saenz (ALJD 52: 26-31). "Obviously, matters of which the Company was unaware prior to the discharge could not be the reasons for the discharge." *Trailways of New England*, 160 NLRB 509, 530 fn. 62 (1966). If certain conduct did not in fact form the basis of an employer's discharge of an individual, it is unnecessary to determine whether that other conduct fell outside of the protections of the Act. This principle is fully demonstrated in the case of *Alton H. Piester, LLC*, supra. In that case, the employer discharged an individual immediately upon his engaging in concerted protected activity. Initially, the employer relied only on that activity as the basis for discharging the employee, but later took the position that other conduct by the employee contributed to the decision to discharge the worker. The Board analyzed the discharge under both *Wright Line* and *Atlantic Steel.* In conducting the *Atlantic Steel* analysis, the Board did not consider whether any of the conduct upon which the employer did not rely fell outside of the protections of the Act. Thus, for example, in conducting the *Wright Line* analysis, the Board considered whether the discharged employee's alleged sexual comment contributed to his discharge. *Alton H. Piester*, supra, 353 NLRB at slip op. 4, fn.24 (2008). However, when the Board conducted the *Atlantic Steel* analysis, it did not consider whether that alleged conduct by the employee resulted in loss of the protections of the Act. *Id.* at 5–6. Once the Board assumed that the other alleged conduct did not lead to the employee's discharge, there

[19] Respondent contends that the statement, "Piss on him", which it presumably learned after watching the videotape at the hearing, should be attributed to Saenz (Resp. Br. 56). However, during the trial no witness testified that Saenz made that comment. In fact, Fostrom testified that it was not Saenz who made that comment (Tr. 1693). The ALJ noted that it was not clear from the video whether Saenz made the comment (ALJD 53: n. 60).

was no need to consider whether that alleged conduct fell outside the protections of the Act.

Thus, in the present case the ALJ properly considered only "Saenz's comments which, admittedly, were the basis for her discharge." (ALJD 57:12–13.)

The second major error Respondent commits is by arguing that the words and acts of others should be attributed to Saenz because she "never repudiated or distanced herself from" those other comments (Resp. Br. 56). Respondent cites no legal basis on which the alleged comments of others could form the basis for concluding that Saenz's conduct was unprotected, perhaps because the most analogous case law is wholly to the contrary. *See, e.g In re Altorfer Machinery Co.,* 332 NLRB 130 (2000) ("Each striker's eligibility for reinstatement must be judged solely upon incidents in which the striker in question is alleged to have participated. Unauthorized acts of violence on the part of individual strikers are not chargeable to other union members in the absence of proof that identifies them as participating in such violence").

b. Respondent Misapprehends the Legal Precedent Regarding the First *Atlantic Steel* Factor.

As previously stated, under established Board law, "when an employee is disciplined for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006) quoting *Stanford Hotel*, 344 NLRB 558 (2005.) In this regard, the Board has long held that an employee's right to engage in concerted activities permits some leeway for impulsive behavior, which the Board balances against the employer's right to maintain order and respect.

In striking that balance, the Board employs the four-factor analysis set out in *Atlantic Steel*, 245 NLRB 814, 816-817 (1979.) The factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by the employer's unfair labor practices. In applying this test, the Board has recently explained that it does not simply mechanically count the number of factors favoring and disfavoring protection. *Success Village Apartments, Inc.,* 347 NLRB 1065, 1069 (2006). The Board stressed therein that an equal balance of two factors on each side does not dictate a conclusion that the conduct has lost the Act's protection. In that case, the Board concluded that an employee's outburst, "What the hell is this crap" to a supervisor, did not lose the protection of the act in the circumstances of that case. The Board found that although two of the *Atlantic Steel* factors, nature of outburst and lack of provocation, weighed against protection, the other two factors, location and subject matter of discussion, weighed in favor of protection and outweighed the other two factors. *Id.*

In the case at bar, the ALJ carefully weighed the four factors set forth in *Atlantic Steel* and determined that Saenz' conduct, on balance, warranted protection of the Act. In applying the *Atlantic Steel* factors to the circumstances of the instant case, the ALJ found that the first factor, *i.e.,* the place of discussion, a public sidewalk, favored the retention of the Act's protection (ALJD 56; 2-13). Since Saenz, who was off-duty, engaged in the alleged conduct outside of the Employer's facility, on a public sidewalk, there was no disruption of employees' work or any undermining of McDermet's authority while he visited the store. This fact points heavily towards Saenz retaining the protection of the Act.

Respondent objects to the fact that the ALJ noted that the employees who overheard Saenz call McDermet "Jimmy" were off-duty (ALJD 56: 12-13) and argue that this is an irrelevant consideration and contends that the appropriate question is simply whether other employees heard the remarks (Resp. Br. 52-54). Respondent misconstrues the ALJ's conclusion and the applicable Board law.

In fact, the relevant consideration when the Board evaluates the first *Atlantic Steel* factor is whether the location of the remarks would "tend to affect workplace discipline by undermining the authority of the supervisors subject to" the remarks. *Verizon Wireless*, 349 NLRB 640, 642 (2007); *DaimlerChrylser Corp.*, 344 NLRB 1324, 1329 (2005) ("In such a place, Valentin's sustained profanity would reasonably tend to affect workplace discipline by undermining the authority of the supervisor"); *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (same); *see Waste Management of Arizona*, 345 NLRB 1339, 1341 (2005) (*Wright Line* case finding that employee's conduct warranted his discharge notwithstanding his protected activity; employee's "conduct was insubordinate, it disrupted the workplace, and undermined Rush's supervisory authority").

In light of this clear Board law, the ALJ's reasoning, (ALJD: 56), is best read as a shorthand method for addressing whether the location of the remark had any tendency to disrupt the workplace. Because Saenz's address of McDermet occurred off of the Employer's premises and away from all on-duty employees, it could not tend to disrupt workplace discipline. Consequently, the ALJ properly found that the location of Saenz's having addressed McDermet in a familiar manner by calling him "Jimmy" weighed in favor of Saenz retaining the protections of the Act (ALJD 57: 1-8). *Noble Metal*

Processing, supra., 346 NLRB at 799-800 (Board affirmed ALJ conclusion that first *Atlantic Steel* factor favored employee's retention of protections of Act; while the employee's statements and behavior occurred in the presence of other employees, such conduct did not occur while employees' were in their work area and therefore did not disrupt the work process or undermine supervisor's authority).

a. The Third *Atlantic Steel* Factor Favors Extending the Protection of the Act to Saenz

In her decision, the ALJ correctly pointed out that Respondent has cited no case holding finding that a merely arguably disrespectful form of address should strip the speaker of the protections of the National Labor Relations Act (ALJD: 57). Indeed, with respect to the third *Atlantic Steel* factor, the ALJ correctly held that the nature of the outburst militates in favor of continued protection for Saenz. The conduct in question—referring to McDermet by his first name, "Jimmy, Jimmy" and following him for about a little more than one city block after he exited the store—is quite unexceptional. In fact, the Board has pointedly allowed employees much greater latitude where they are engaged in raucous concerted activities. *See Union Carbide Corporation*, 331 NLRB 356 (2000) (while the Board found employee's behavior in calling his supervisor a "fucking liar", rude and disrespectful, his conduct was not so "out of line" as to remove him form the protection of the Act); *Severance Tool Industries, Inc.*, 301 NLRB 1166 (1991) (the Board found that despite contention that employee's behavior of calling employer's president "son-of-a-bitch" and threats to discredit president's personal reputation was insubordinate, disrespectful and belligerent, the conduct was nonetheless protected); *Lana Blackwell Trucking*, 342 NLRB 1059 (2004) (where an employee's disrespectful,

angry, and shocking outbursts" toward the manager and president occurred in the context of concerted activities and did not remove the employee from the protection of the Act).

The remainder of Respondent's argument regarding the third *Atlantic Steel* factor depends on the untenable legal claims disposed of in argument, above.

Consequently, both the first and third *Atlantic Steel* factors weigh heavily in favor of Saenz retaining the protection of the Act. *Stanford Hotel,* 344 NLRB 558, 559 (2004) (although employee engaged in profane and offensive conduct toward his manager, he did not lose protections of the Act). Respondent's arguments to the contrary should be rejected and the Board should affirm the ALJ's conclusion that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Isis Saenz.

POINT 3. The Administrative Law Judge properly found that Respondent discharged Joseph Agins on December 12, 2005, because of his union and other protected concerted activities in violation of Section 8(a)(1) and (3) of the Act.

A. Material Facts Regarding Joe Agins

Agins Becomes an Open and Active Member of the Union

From early June 2005, Agins was one of the most open and active members of the union, continuing right up to his discharge in December 2005 and even after that point. Agins engaged in numerous protests, pickets and flyering events at his own store and other Starbucks stores (ALJD. 35). The examples given, which were unrebutted, include participation in the large June 18, 2005 demonstrations at the store and 17th Street and First Avenue and then at his store at 2nd and 9th (Tr. 913). Managers such as Tanya James, Julian Warner, Vivian Hickenbottom and Alex Perez saw Agins engaged in these union demonstrations (Tr. 914-915). In addition, during the summer and fall of 2005

Agins leafleted openly on behalf of the union, wearing union insignia each time, at a number of different Starbucks stores in lower Manhattan.[20] In all, Agins estimated that he leafleted over 20 times after the May 28, 2005 union announcement in his store (Tr. 920).

At another point in the summer of 2005 after June, Agins had a second conversation with Julian Warner regarding his support for the union. On this occasion, Agins approached Warner and told Warner that he and others were not union members out of hatred of management but because they wanted to improve working conditions. Tr. 921-922). Agins explained that he decided to approach Warner again about the union because he felt the company was pressuring him because they knew he was with the union (Tr. 922). Warner's attitude and behavior towards Agins had changed after he learned of Agins union support on May 28, 2005. Prior to that time, Warner was extremely friendly with Agins, talked about all types of matters with Agins, and even regularly had lunch with Agins (Tr. 925). After that date, Warner ceased his lunches and friendly conversations with Agins (Tr. 926).

Ethos Water Event

In August 2005, Agins attended a Starbucks promotional event at the South Street Seaport with other union members and supporters from the IWW (Tr. 939). Agins and at least two or three of the others, including Agins' father, Joseph Agins Sr. were wearing union buttons, union hats or other union insignia. The promotion consisted of a march around the South Street Seaport on behalf of Ethos Water, a new Starbucks vendor. Agins recalled that he and the other IWW supporters brought leaflets and

[20] Agins identified six stores (Cooper Union store, Astor Place Store, Union Square East, Union Square West, 15th Street and 3rd Avenue, West 14th and Broadway south of Union Square) See Tr. 916-920.

"attempted to flyer" (Tr. 940). Starbucks management h ad monitored his union activities on that occasion and reported on them: an e-mail dated August 8, 2005 from store manager Julian Warner to District Manager Will Smith reports that Agins was seen distributing union flyers at the Ethos event (G.C. Ex. 101). At the Ethos event, Agins saw Warner and saw an individual whose name he later learned was Ifram Yablon, a store manager at another Starbucks store who occasionally visited the 2nd and 9th store as a customer (Tr.941). At the Ethos event in August, Agins' father was wearing a black IWW cap (Tr. 940). Agins saw Yablon approach his father and say something (Tr. 942). Agins learned that Yablon stated "look at that old bastard—he's with the union, IWW" (Tr. 943).

Agins continued his open and active union activities when the union ramped up its activities in November 2005. During that period of time, Agins leafleted at three different Starbucks stores (Tr. 929). Agins also participated in the November 25, 2005 large union demonstration on "Black Friday" in front of the Union Square Square East store.

Starbucks Orders Montalbano to Remove his Union Button

On November 20, 2005, Montalbano worked the evening shift at his store (Tr. 1499). Sometime after 5 p.m., Smith bid Montalbano goodnight and exited store (Tr. 1499-1500). After Smith left the store, Montalbano explained to Livensperger that the National Labor Relations Board ("NLRB") had issued a complaint on the issue of wearing union pins and that the workers at Union Square wore the union pins in there store (Tr. 1500). Montalbano and Livensperger agreed to each put on one union pin (Tr. 1500).

Later that evening, Smith returned to the store (Tr. 1501). Smith approached Montalbano and Livensperger and asked them into the back room. Then Smith ordered them to either remove the union pins or go home (Tr. 1501). Montalbano informed Smith of the NLRB complaint and argued that the workers at Union Square were allowed to wear their pins (Tr. 1501). Smith was not persuaded and again ordered them to remove the union pins (Tr. 1502). Consequently, Montalbano and Livensperger took the union pins off and returned to work (Tr. 1502).

Later that evening, Warner entered the store (Tr. 1502). Montalbano found this unusual because Warner was not scheduled to work that evening (Tr. 1502). Warner never put on a uniform. He just sat in the back for the rest of the evening in his street clothes (Tr. 1502).

Subsequently, Montalbano discussed the pins issue with the members of the Union (Tr. 1503). Montalbano told them that the workers at his store were not allowed to wear union pins. The Union decided that Montalbano would attempt to wear the pin on November 21, 2005.

IWW Members Engage in Concerted "Union Button Action" on November 21, 2005 at the Second Avenue and 9th Street Store.

Montalbano worked the closing shift at his store on November 21, 2005 (Tr. 1503). James worked that that evening as well (Tr. 1503). Montalbano testified that the store was pretty slow that evening. He estimated that there were less than ten customers in the store (Tr. 1503).

That evening, the delegation arrived at the store as planned to support Montalbano in case he was threatened with being sent home if he wore his union pin (Tr. 548, 799, 1503). The delegation included Malchi, Ayala, Hincapie and Agins (Tr. 547-548).

The group wore hats and pins with the IWW logo. They also wore union t-shirts (Tr. 548, 930, 2030). When the group entered the store, they greeted Montalbano and told him they supported him (Tr. 1504). Agins recalled that Montalbano put on his union pin at the behest of the union members (Tr. 549, 932). Montalbano recalls turning to James and informing her that he was going to put on his union pin (Tr. 1504). He explained to James he had a legal right to wear the pin and that he would not remove the pin (Tr. 1504). James acknowledged Montalbano and went to the back room (Tr. 932, 1505). Montalbano put on his union pin and continued to work (Tr. 1505). Agins recalls that when James went to the backroom, she said she was going to call District Manager Will Smith (Tr. 932.)

Suley Ayala proceeded to the bathroom, and the other union members in the group except for Agins sat down at a table near the back (Tr. 549, 800). Agins remained standing, first at the counter and then closer to where the group was sitting. He engaged in some conversation with Montalbano (Tr. 933).

A short while after Montalbano put on his union pin, Ifram Yablon walked into the store (Tr. 549, 1506). Yablon was a store manager at another Starbucks store (Tr. 549, 1506). Yablon walked over to the counter and placed a drink order with Montalbano (Tr. 549, 1506). After Yablon paid for the drink, Yablon walked a couple of feet away from the register and turned to the delegation (Tr. 1506). Montalbano testified that Yablon pointed at Agins and his union pin[21] stating, "Hey, why do you need a union? The company has great benefits. They give benefits to part-time employees. You know,

[21] Malchi also testified that Yablon pointed at the union button Agins was wearing (Tr. 550).

you don't need a union here" (Tr. 1506).[22] Agins responded, "Oh the Union is good for workers. It gives workers a voice" (Tr. 1506). Agins recalls additionally pointing out to Yablon that they joined a union for respect, better hours, steady scheduling, and better wages (Tr.935). It is undisputed that Yablon and Agins commenced arguing about the benefits of having a union (Tr. 936, 1507).[23] They were now only standing three or four feet away from each other but their voices grew louder (Tr. 936, 1507). Both Yablon and Agins began to make hand motions (Tr. 1507). According to Ayala, who had come out of the bathroom and noticed the argument, Yablon was talking aggressively with his hands (Tr. 801). Agins recalls Yablon was in his face and that Yablon put his hands up (Tr. 936). The ALJ properly credited Agins' testimony, which was corroborated and which was not rebutted by any Respondent witnesses, that both Yablon and Agins used profanity towards each other (Tr. 801, 870, 939, 1014). At some point during the argument, Agins told Yablon that Yablon had disrespected Agins' 63-year-old father at the Ethos Water event the previous summer (Tr. 935).

Tanya James testified that she was behind the pastry counter at the time and recalls it was Yablon that initiated the conversation by commenting on Agins wearing a union pin and asking what it was for (Tr. 2002). James also recalled that Agins responded that the pin was a union pin and that that they were trying to organize a union (Tr. 2033). Finally, she appeared to recall Agins making the statement to Yablon during the argument about disrespecting his Dad (Tr. 2002-2003, 2034). She also recalls, upon coming out from behind the counter telling Yablon that he "had to leave it alone" (Tr.

[22] Agins remembered Yablon's remarks about the union as "You don't need no union inside Starbucks" and that Yablon mentioned the company's health benefits and 401k (Tr. 934).
[23] James confirmed that both men exchanged words and that their argument was about the topic of the union (Tr. 2037).

2034). She asserts that Yablon did a hand gesture and then walked out (Tr.2003). Malchi heard James ask Yablon to leave and saw her escort him out of the store (Tr. 551, 697). As correctly noted by the ALJ, the description of the Agins-Yablon interaction described by General Counsel's witnesses up until this point was generally corroborated by James (ALJD 45: 1-4).

When the conversation between Yablon and Agins grew louder, Montalbano told Agins to calm down. Malchi and Ayala called Agins over (Tr. 550, 817, 937). Agins went and sat down at the table with the group. Agins was still upset (Tr. 551, 695, 937). Agins told Malchi that Yablon was disrespecting him and his father. Agins also told Malchi that Yablon was talking against the union and saying that they shouldn't have a union (Tr. 550-551). At some point, Montalbano communicated to the union delegation that he would not be disciplined for wearing a union pin[24] (Tr. 1508). The union group left the store several minutes later (Tr. 552, 697).

The ALJ properly credited Agins, corroborated by Malchi, Ayala and Montalbano, that James came over to speak to him only after he had already sat down with the others (Tr. 1013, 1018, 802, 870, ALJD:45:14-16). The ALJ also properly credited Agins' forceful denials, also corroborated the other General Counsel witnesses, that he did not utter any profanities towards James once she came over to speak to him (Tr. 1018). The ALJ specifically discredited James' assertions that Agins resisted the efforts of his companions to intercede, that he followed Yablon towards the door, or that he proceeded to shout profane comments and advance towards her even after she told him to calm down.

[24] Montalbano testified that at some point during this incident, James told him that she had spoken to Smith on the phone and he had told her that Montalbano could wear the union pin as long as he continued to work (Tr. 1505).

Respondent excepts to these significant credibility determinations regarding James (Resp. Br. At 41-46). It is well settled that the Board grants broad deference to and will not overturn an Administrative Law Judge's credibility findings unless it is convinced by a clear preponderance of all relevant evidence that those credibility resolutions are incorrect. *Upper Great Lakes Pilots, Inc.*, 311 NLRB 131 (1993); *Storer Communications, Inc.*, 297 NLRB 296, fn. 2 (1989), citing *Standard Dry Wall Products,* 91 NLRB 544 (1950). enfd. 188 F. 2d 362 (3rd Cir. 1951). In the instant case, the ALJ carefully explained her credibility determinations regarding James and they should not be disturbed (See ALJD at 45:13-30; 46:22 to 47:48). In sum, in addition to demeanor, the ALJ relied on the inherent implausibility and self-serving nature of James' testimony, and the fact that the documents offered by Respondent in support of James' version were either not authored by James (See Resp. Exhibits 27 and 51; Tr. 2036, 2503) or did not corroborate her testimony in any event. Indeed, the only document authored by James pertaining to the November 21 events, according to her own testimony, inexplicably was not produced by Respondent (Tr. 2007, 2037-2039)

B. **The Adminstrative Law Judge correctly found that Agins was putatively fired for conduct which was part of the *res gestae* of protected concerted activity on November 21, 2005.**

Respondent has challenged the finding that Agins was fired for conduct which was part of the *res gestae* of protected concerted activity (Resp. Br. at 28-31). But the ALJ quite properly found that Agins and the other IWW supporters were engaged in protected concerted activity on November 21, 2005. The ALJ based her findings in this regard (See ALJD 43:45 through ALJD 44:24) on the largely undisputed facts, as follows: Agins, together with his fellow union members visited the store at Second

Avenue at 9th street as part of a planned solidarity action to support union member Peter Montalbano in wearing a union button on the job. This action, engaged in by several union members in addition to Agins, was clearly protected by the Act. The union members, including Agins, who participated, all displayed union insignia, including but not limited to union buttons. The record evidence regarding this concerted union action reflects that it was an effort to demonstrate that the union members at Starbucks had federally protected Section 7 rights to wear their buttons. The NLRB had, just three days before the action, issued a complaint, which among other things reaffirmed the right of the IWW Starbucks union members to wear union buttons (Tr. 1501). Management had been prohibiting the wearing of the buttons by members on pain of discipline, which in most cases involved being sent home. Peter Montalbano had faced this type of discipline just the day before the November 21 union button action (Tr. 1501-1502). .

The ALJ noted in this regard, that the union button action on November itself was protected and that the argument which ensued between Yablon and Agins was initiated by Yablon commenting on Agins' union pin and making further comments as to why employees at Starbucks did not need a union. So when Ifram Yablon entered the store that day and provoked an argument with Agins, the argument clearly occurred during, and was directly related to, the union and protected concerted activity of Agins and the others. The ALJ also correctly observed that Yablon, a manager at another Starbucks, would have been aware of the significance of the union insignia, based on the extensive record evidence that Starbucks closely tracked union activity at its stores (See in this regard, G.C. Exs. 7-8, 10, 54-63, and Charging Party Exs. 1-15). Finally, the ALJ properly rejected Respondent's contentions to the effect that somehow the November 21

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button solidarity action morphed into a personal dispute once Yablon began speaking to Agins (Resp. Br. 30-31). To the contrary, as explained by the ALJ, while Agins did refer, during his argument with Yablon on November 21, 2005, to Yablon's perceived insult of his father on an earlier occasion, that perceived insult itself occurred within the context of another instance of union and protected concerted activity by Agins (ALJD at 37:30-36, 44:18-24). Based on the above facts, the ALJ, in agreement with General Counsel, correctly concluded that when Starbucks managers, on December 12, 2005 informed Agins he was fired for the "disruption of business" on November 21, 2005, the company was referring to his conduct during an event that was itself a protected concerted solidarity action.

C. **The Administrative Law Judge correctly concluded, after applying the Atlantic Steel factors, that Agins did not engage in conduct sufficiently egregious to lose the protection of the Act.**

Under established Board law, "when an employee is disciplined for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006) quoting *Stanford Hotel,* 344 NLRB 558 (2005). In this regard, the Board has long held that employees' rights to engage in concerted activities permits some leeway for impulsive behavior, which the Board balances against the Employer's right to maintain order and respect.. In striking this balance, the Board generally employs the four-factor analysis set out in *Atlantic Steel*, 245 NLRB 814, 816-817 (1979). The factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's unfair labor practices.

There is no record evidence that any other customers present knew that Agins or Yablon were employees of Starbucks. Finally, as noted by the ALJ, Yablon had also used profanity in his argument about the union with Agins. But Starbucks did not find it necessary to discipline Yablon in order to maintain order and respect among its employees.

As to the second *Atlantic Steel* factor, the subject matter of the discussion, the ALJ properly found that this factor weighs in favor of protection. Not only was Agins engaged in protected activity (the union button support action) at the time of the discussion, but the subject matter of the argument between Yablon and Agins was the union itself.[25] Agins' defense of the union in response to Yablon was itself protected activity. *Network Dynamics Cabling, Inc.,* 351 NLRB 1423, 1429 (2007). The ALJ in this case correctly noted that the fact that some personal comments were made (the perceived insult to Agins' father) was clearly not sufficient to counterbalance the otherwise protected nature of the dispute. This is especially so where as here, that earlier insult itself, as noted above, stemmed from protected conduct on the part of Agins (ALJD 48:27-38).

The third *Atlantic Steel* factor, the nature of the outburst, also weighs in favor of Agins' protection. This factor, as correctly noted by the ALJ, is largely controlled by the ALJ's credibility determinations, which, as argued above should not be disturbed (ALJD 48: 39 through ALJD 49:14). In this regard, as discussed above, the ALJ discredited testimony by Tanya James suggesting that Agins outburst was extreme or prolonged. The

[25] James admitted in her testimony that she heard Yablon ask Agins about his union button, additionally heard Agins' initial response that they were trying to organize a union, and that she knew that the subject of their ensuing argument was the union at Starbucks (Tr. 2002, 2033). Yablon was not called to testify by Respondent and the ALJ properly found that this failure warranted an adverse inference that his testimony would not have supported Respondent's contentions (ALJD 47:35-45). .

ALJ also discredited the obviously self-serving testimony of James suggesting that Agins acted in a threatening or physically intimidating manner towards her (ALJD 45: 5-20). In light of these credibility findings and the undisputed record evidence that Agins was "goaded" initially by Yablon, the ALJ properly found that this factor weighed in favor of retaining the protections of the Act. The ALJ noted in this regard the fact that record evidence showed that Respondent's approach to discipline in instances of profane outbursts varied, and that certain personnel records showed instances where Respondent meted out lesser discipline for similar conduct, even when repeated by employees who have other discipline in their files (ALJD 49: at fn. 55).

The ALJ found that the fourth factor under *Atlantic Steel*, the element of provocation, also weighed in favor of protection. Respondent's arguments to the contrary appear to be based in part on its contention that the exchange between Agins and Yablon "had nothing to do with the button action" (Resp. Br. at 37). Given the undisputed evidence that Yablon specifically challenged Agins on the need for a union at Starbucks during the course of that button action, this claim by Respondent is inexplicable. Second, while Yablon's provocation itself was not alleged as an unfair labor practice, the Board has not always required the presence of a proven unfair labor practice in weighing this factor under *Atlantic Steel.* See *Network Dynamics Cabling, Inc.,* supra, 351 NLRB at 1427 (where employee's outburst, in the course of protected concerted activity, was provoked by supervisor's comments to the employee that he could not keep informing the union organizer where the employer was working, which were not alleged as an unfair labor practice, the Board nonetheless held that the provocation weighed in favor of protection under *Atlantic Steel*) ; *Overnite Transportation Co.*, 343 NLRB 1431,

1437-1438 (2004) (provocation by supervisor in the form of a refusal to discuss circumstances of discharges held to weigh in favor of protection, although the refusal to discuss was not alleged as an unfair labor practice); *Felix Industries*, 331 NLRB 144, 145 (2000) enf. denied and remanded 252 F.2d 1051 (2001), on remand 339 NLRB 195 (2003), enfd mem 2004 WL 1498151 (D.C. Cir. 2004) (fact that an outburst by employee was triggered by supervisor's hostile response to employee's protected activity was a factor in favor of protection under *Atlantic Steel*, although the supervisor's response had not specifically been alleged as an unfair labor practice). Second, as the ALJ pointed out, in this case, the context of the argument is important as well. Based on the undisputed testimony, Yablon's comments about Agins' wearing of a union button were made directly to Agins and occurred just three days after an NLRB Complaint had issued against Respondent for depriving employees of their right to wear union insignia. In that context, where the comments of Yablon addressed the union button action, and that action was initiated to protest rules subject to outstanding allegations of unlawful unfair labor practices, the factor of provocation should weigh in favor of protection. For all of the reasons discussed above, the ALJ properly ruled that Agins, during the November 21, 2005 union button action, did not engage in any conduct sufficiently egregious so as to lose the protection of the Act.

D. **The ALJ correctly determined that, in the alternative, Respondent violated Section 8(a)(1) and (3) of the Act by discharging Agins, if analyzed under the *Wright Line* Framework.**

Although, as demonstrated above, Atlantic *Steel* provides one appropriate framework for analyzing the discharge of Agins, General Counsel submits that the ALJ was correct in finding the same result using the *Wright Line* burdens of proof.

In this regard, it cannot be seriously disputed, as found by the ALJ, that Agins was a particularly open and active IWW Starbucks Union member. He participated in major actions such as the demonstrations in June 2005 at the Second and 9th Street stores and at the 17th and First Avenue Store. He engaged in flyering for the union numerous times at numerous stores. It is clear beyond doubt that Respondent was aware of his union activities. He testified without contradiction that managers were present and observed him on many occasions when he distributed flyers at many of Respondent's stores during the summer and fall of 2005. Agins' uncontradicted testimony is that he twice initiated conversations with his store manager Julian Warner to inform Warner of Agins' union support. His credible testimony was that Warner's attitude and conduct towards him changed completely from very friendly to less than friendly after Agins' union support became known (Tr. 925, 926). As noted above, Agins was one of those IWW activists monitored by Respondent as part of its monthly and weekly recaps of union activity in the New York Metro Area. Pursuant to this program, Julian Warner reported Agins' presence with other IWW supporters, distributing union flyers at the August 3, 2005 Ethos Water promotion (GC Ex. 101, CP Ex. 11). When District Manager Will Smith received this information he immediately reported it to Partner Resource Director Traci Wilk. Wilk, in turn requested information as to whether Agins had been scheduled for work that day and if he had been on time if he was scheduled (CP Ex. 11). Wilk admitted that she was trying to determine if Agins was distributing flyers while working. But Wilk could not "recall" whether it was her normal practice to make such inquires in situations where an employee was observed on the street handing out invitations for some matter not relating to unions (Tr. 1840.). It seems clear based on

this record evidence that her inquiry reflects Respondent's animus toward Agins, inasmuch she was attempting to "catch" Agins in some sort of violation, with an eye towards possible discipline. However, that was not possible on that occasion, because it turned out that the promotion occurred on Agins' day off. (CP Ex. 11). Still another reflection of animus towards Agins in particular can be seen in the visit to his store of Regional Vice President Jim McDermet sometime between June and November 2005. On that occasion, McDermet came up to Agins and provocatively asked him if he liked working at Starbucks (Tr. 923-924).

The ALJ also relied on another significant piece of evidence showing animus and in fact the real reason for Agins' discharge: the PAN Separation Notice reflecting his discharge (G.C Ex. 77, ALJD 51:21-25). This document was prepared by Store manager Julian Warner. In the comments section explaining why Agins would not be eligible for rehire, one of the two reasons listed is "Partner strongly supports the IWW Union" [emphasis added]. General Counsel submits that one could not find a more damaging admission reflecting Respondent's animus towards Agins than an official company separation notice stating that Respondent would not rehire him in part because of his union support. The strong inference that the reason for his ineligibility for rehire was the same as the reason for his discharge was not in any way dispelled by Respondent. Warner did not testify. The attempt by District Manager Smith to "explain" Warner' s notation and his state of mind was not only incredible but was properly rejected as

inadmissible at trial (Tr. 2506-2508) and given no weight by the ALJ in her decision (ALJD at 51:24-25).[26]

All of the above described evidence strongly supports a finding that Respondent knew of Agins' union activities, harbored animus towards him because of those activities and fired him because of the extent of his union support and activities.

In examining Respondent's purported defense under *Wright Line*, the ALJ properly concluded that it failed to survive scrutiny. In this regard, the ALJ noted Respondent's contradictory testimony regarding the responsibility for the decision to discharge Agins and the false reasons proffered for his discharge at trial. (See ALJD at 51:15 through ALJD 52:2). District Manager Will Smith in particular was wholly incredible on several key points concerning the alleged decision-making process leading to Agins' discharge. Smith was properly discredited where his testimony differed from that of Agins. Agins clearly and credibly testified that neither Smith nor any other manager spoke to him regarding the November 21, 2005 button incident until the day he was fired--- December 12, 2005 (Tr. 944, 950). Smith, while initially claiming that he spoke in person with Agins regarding the reasons for his discharge before December 12, gave versions of that alleged conversation and of the November 21 incident which are

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[26] The timing of Agins' discharge is also relevant. He was fired shortly after the November 2005 period during which the IWW Starbucks Union accelerated its organizing campaign. The union members at Union Square East announced their membership and demanded to meet with management on November 18. In tandem with the NLRB complaint, which also issued on November 18, Agins and others participated in the union button solidarity action on November 21. At the end of that same week, the union activity culminated in the large all-day demonstration and news conference on "Black Friday," November 25, 2005. The union activity of that week generated both news coverage and responses from the top management of Starbucks (See G.C. Exs. 10, 22, 63, 64). Agins was fired just weeks after this flurry of activity, and Agins, one of the leading union adherents, participated in virtually all of those activities.

demonstrably false. In this regard, Smith first claimed that he sat down and spoke to Agins after he received a phone call about the incident, and that "we" decided to move to termination (Tr. 2502). The fact that Smith's claim about speaking directly with Agins was a fabrication first became obvious when Smith described the incident that he spoke with Agins about as the one where Agins threw a chair (Tr. 2502). There is no record evidence that the November 21 button action or any other incident involving Agins pertained in any way to Agins throwing a chair. At that point it became clearer that Smith was not recalling any real event and the Administrative Law Judge termed his testimony on this point "confusing." Smith responded with the less than credible statement: "obviously I had some type of conversation with Joe about the incident" (Tr. 2504). Smith just added to his lack of credibility when on cross examination he offered that the incident in November 2005 which led to Agins' discharge was one where Agins had been "on the clock," when in fact Agins was off duty and came into the store with his fellow union members (Tr. 2522, 2523). It should be quite clear from the above that Smith's testimony that he actually met with Agins after the November 21 button action cannot be and was not credited. Moreover, as noted by the ALJ, Smith had no independent recollection of <u>any</u> of the pertinent events regarding Agins, which clearly undercuts Respondent's assertions that Julian Warner and Smith made the decision to discharge Agins and that the decision was made for non-discriminatory reasons (ALJD 42:10-16, ALJD: 51:15-21). .

Smith also falsely denied that he had told Agins in May 2005 that he would tear up a planned corrective action about a prior incident on or about May 14, 2005 involving Agins and Tanya James. In that incident, James the Assistant Store Manager sent home

Agins before the end of his shift. Agins felt James had been disrespectful to him in front of customers when he requested her assistance. James accused Agins of insubordination because he had cursed at her under his breath, allegedly threw a blender into a sink and allegedly refused to leave the premises after she requested he do so. Agins admitted the cursing under his breath but denied that he threw a blender or refused to leave once James asked him to close his till and clock out. But the point is that after all was said and done, although Agins was sent home that night, he was reinstated to work in a matter of days by the District Manager Smith, after Smith heard Agins' version of the incident. The ALJ correctly credited Agins' clear and credible testimony that Smith promised Agins on that occasion in May 2005 that he would tear up and not issue the corrective action that apparently had been prepared (Tr. 958, 987-988). Agins' testimony was corroborated by the fact that the corrective action document, while apparently not torn up, was never given to him. It bears no signatures or dates on the bottom portion, indicating that it was never administered to an employee (See Resp. Exhibit 16). Based on the above evidence, the ALJ properly credited Agins, over Respondent's witnesses, Smith and Wilk, that Agins never received any discipline regarding the May 2005 incident (ALJD 51: 40 to 52:2). The import of this is that Agins was not on final warning and in fact had not been formally disciplined for the earlier incident, as claimed by Respondent. As such, in evaluating Respondent's defense under *Wright Line,* the ALJ properly relied on this false reason for Agins' discharge, together with Respondent's false claim that Agins had been counseled early on in his employment about alleged composure issues. As correctly noted by the ALJ, both false claims support an inference that the real reason for Agins' discharge was discriminatory.

Respondent, in its brief, argues that the ALJ erred by "disregarding" the May 2005 incident. (Resp. Br. 47-49). But, as explained above, the ALJ did not disregard this incident but instead discredited Respondent' witnesses as to what happened to Agins as a result of the incident.

Respondent argues additionally that the ALJ, in her *Wright Line* analysis, "ignored" evidence in the record that Agins was treated consistently with some other employees (Resp. Br. At 49-50). Here Respondent misconstrues its burden under *Wright Line.* The issue is not, as Respondent has put it, whether Respondent "could have" terminated Agins for the November 21 incident alone (Resp Br. at 48-49). Rather, as correctly explained by the ALJ, Respondent's burden is to show that it would have discharged Agins notwithstanding his protected conduct (ALJD 51:33-34). In this regard, the personnel files of several Starbucks employees introduced into the record by General Counsel showed that Respondent could not make out a *Wright Line* defense that it consistently discharges employees who engage in serious outbursts while on the job. Instead these records indicate that Respondent has meted out lesser discipline for such offenses even if repeated by employees who have other discipline in their files. For example, employee Troy Bennett (GC Ex. 67) received only a written warning for cursing at other partners and customers while on duty and for yelling at the supervisor. (GC Ex. 67 at Bates # 20574). Employee Noah Francis, after receiving a final written warning on 1/26/07 for making sexually suggestive comments to customers, did not get fired but received yet another written warning, when he, just two weeks later on 2/12/07, engaged in unwanted physical contact and danced with a customer, leaving the customer and her husband upset (GC Ex. 68, Bates #20991, 20989). Carlos Martinez received a

written warning for telling a supervisor that no one wants to work with her and he doesn't care and then just received another written warning after he refused to work after being asked top clean –he told the supervisor he "wasn't going to clean for no one" (GC Ex. 74, Bates # 17836, 17832). Kevin Bruckner received a written warning for using the "F" word to an ASM; another written warning for getting upset over a conversation between the ASM and a co-worker; another written warning for telling a co-worker what a bad job the worker was doing in front of customers, and yet another final" written warning for saying "you can fucking write me up if you like" in front of other customers and employees. (GC Ex. 66, Bates # 27344, 27345, 27332; 27318; 27321). (See also GC Exs. 69-73, 75-76).

In light of the above-described evidence of employees treated more leniently for serous "outburst" types of offenses, Respondent's introduction of other personnel files which purport to show disciplinary events consistent with that of Agins are not sufficient to satisfy its burden of proof under *Wright Line*. Assuming that the files collected in Resp. Summary Exhibit 53 reflect that Respondent has fired or otherwise disciplined employees for conduct similar to that of Agins, the evidence introduced by General Counsel show that Respondent has also tolerated similar or worse conduct. In *Avondale Industries*, the Board noted that an Employer's *Wright Line* defense is not met simply by showing examples of consistent treatment or even by showing that such examples outnumber the examples of disparate treatment. Rather, Respondent must show that the instances cited by the General Counsel are so few as to be an anomalous departure from what is an otherwise general consistent past practice. *Avondale Industries*, 329 NLRB 1064 (1999). Accord: *Regional Medical Center at Memphis*, 343 NLRB 346, 363-364

(2004); *Septix Waste, Inc*, 346 NLRB 494, 496-497 (2006). The examples cited above establish that Respondent did not meet this burden in the instant case. Therefore the ALJ properly relied, at least in part, on evidence showing that Agins was treated in disparate fashion from other employees.

Point 4. **The ALJ Correctly found that Respondent, on January 29, 2006, issued a negative performance review to Daniel Gross because of his activities on behalf of at the union and because of his other protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act.**

It is undisputed that Respondent issued a written performance review to Daniel Gross on January 29, 2006 (Tr. 1086, GC Ex. 35). Gross had been working at Starbucks since May 2003 and had received at least three other performance reviews. All three previous reviews in the record, on a scale of 1-3, were graded as 2 or 3. ("Meets Expectations" or "Exceeds Expectations"). (See G.C. Exs., 37-39). For the first time, on January 29, 2006, Gross received an overall grade of "1," or "Needs Improvement," the lowest grade. The total grade is derived from averaging the grades for each of the two separate sections on the review, with each section having several categories. Each section is weighted 50% and if the employee's average on the two sections is 1.6 or above, he or she receives a "2". If the average is 1.59 or below, he or she receives a "1". This is significant because a "1" grade means the employee is not eligible to receive the typical six month wage increment. January 29, 2006 was the first time Gross was deemed ineligible for a raise.

In his previous performance review, dated May 27, 2005, Gross received an overall rating of "2" and received ratings of "3" in 5 of the 18 categories. He received a rating of "1" in only two categories in that previous review (See GC. Ex. 39). In stark

contrast, in the January 29, 2006 review, Gross received "1" ratings in **nine** of the 18 categories and did not receive **any** "3" ratings. Gross testified credibly that his job performance had not changed from the time he received his favorable performance review in May 2005 to the time he received the review in question on January 29, 2006. In particular, Gross testified that his calm demeanor in the store did not change and that he was consistently punctual during both rating periods (Tr. 1119-1120). His testimony was uncontradicted on this point. Neither store manager James Cannon, who signed the January 2006 review, nor District Manager Mark Anders, who accompanied Cannon at the review on January 29, was called to testify by Respondent. Gross testified further that at the January 29, 2006 review, Cannon read part of the text of the review, but did not explain how or why he felt Gross's performance had declined so precipitously in such a short period of time in so many categories. (Tr. 1091).

Of particular note, neither manager explained the low "1" rating in the third category on page one of the review under "Key Responsibilities." In the "Results" box for that category, the comments state that "Dan does not display behaviors that would indicate a positive **attitude [emphasis added]** about Starbucks..." January 29, 2006 was the first time Gross had received any written comments about his "attitude" in connection with promoting the "culture values, and mission" of Starbucks. Inexplicably gone from this third rating category box on page 1, was any mention, as had been present in his past reviews, of Dan's consistent ability to remain calm and steadfast during periods of high volume, which had in the past earned him ratings of 2 and 3 in this category (See GC Exs., 38, 39—third category on page one of each review). This is highly significant, especially since, as discussed infra, Respondent store manager Jose

Lopez readily admitted that Gross's overall "attitude" was a key factor in the company's decision to discharge him.

Respondent excepts to the ALJ's finding that Gross' January 2006 Performance Review was discriminatorily motivated (Resp. Br. at 69-78). Contrary to Respondent's contentions, the ALJ properly followed well-established Board precedent establishing that Employer comments about an employee's bad "attitude" can be, in the appropriate context, a veiled reference to the employee's protected activities. *Tradesmen International, Inc.*, 351 NLRB 579, (2007) (Employer claim it denied employment to applicants because of their attitude or because they would not "fit in" held to be veiled reference to their protected union activity); *Children's Studio School, Public Charter School*, 343 NLRB 801, 805 (2004) (claim that an employee was fired because she did not have the "right spirit" and for being unwilling to work together as a team deemed similar to accusing the employee of a bad attitude, which is veiled reference to protected activities). Accord: *Climatrol, Inc.*, 329 NLRB 946 fn. 4 (1999); *Promenade Garage Corp.*, 314 NLRB 172, 179-180 (1994); *Cook Family Foods*, 311 NLRB 1299, 1319 (1993).

Respondent's assertion (Resp. Br. At 70-72) that bad attitude in and of itself is not evidence of anti- animus also misses the mark in the instant case. The ALJ relied on far more than the mere mention of attitude. Respondent offered no witnesses regarding the January 2006 Performance Review meeting, and the ALJ properly credited Gross's testimony that neither manager present explained to him what they meant by the references to attitude. (ALJD 63:35-52). In addition, and even more compelling, the ALJ noted that Respondent adduced no evidence, either through testimony or specific

examples, as to (1) why Gross's job performance in general had supposedly suffered such a precipitous decline from May 2005 to January 2006; or as to (2) how Gross's supposed poor attitude had any impact on the way he performed his job (ALJD 64: 33-41; ALJD 66:10-23). As noted by the ALJ, he was actually rated as "meeting expectations" in all categories relating to customer service and drink preparation (ALJD 66:29-30). So the ALJ was fully justified in relying on Respondent's reference to attitude without explanation, the complete failure to connect the alleged poor attitude with any deficiency in the performance of duties, and the lack of any explanation for the overall downgrade in many of the written ratings on his performance, in the January 2006 review.

The General Counsel notes further that the performance review was administered shortly after the November 2005 period during which the IWW Starbucks Union and Daniel Gross in particular had begun what Gross testified was a "major escalation" of its union organizing at Respondent (Tr. 1073). That escalation included the November 18, 2005 union announcement and associated leafleting at Union Square East, in which Gross played a prominent role and spoke directly on behalf of the union to store manager Quintero (Tr. 1074). Further, it was Gross who, on November 23, 2005, signed and personally delivered the letter registering the union's protest to the managers at the Second and 9th Store regarding Respondent's continued violation of the rights of its members to wear their union buttons (Tr. 1075, GC Ex. 34). Gross was the main organizer of the November 25, 2005 "Black Friday" union protest rally in front of the Union Square East store. Gross spoke publicly at that rally and moderated the press conference as Suley Ayala and others spoke to reporters (Tr. 1078). Gross was quoted in the New York Times article (GC Ex. 22) regarding that rally, and Respondent's CEO Jim

Donald sent a message to employees specifically in response to that article which was posted in Respondent's stores (Tr. 1079, GC Ex. 10). When Joe Agins was fired unlawfully on December 12, 2005, allegedly for his actions during the union button action on November 21, it was Gross, representing the union, who confronted store manager Julian Warner to protest the retaliatory treatment of one of its members (Tr. 1081, 1518-1519). Gross engaged in three other open, prominent union activities in late December 2005 and January 2006. Gross participated in a union protest in public at the Second and 9th Street store in late December where the protesters were dressed as Christmas carolers (Tr. 1082-1083). Gross, as noted above, was the primary person generating union news releases, which appeared regularly on the union's website. His contact information, including his phone number, appeared on the news releases and on the website. In January 2006, Gross posted a union press release which quoted a study comparing Starbucks health insurance coverage unfavorably with that of Wal Mart (Tr. 1084, 1152-1153, GC Ex. 40(F)). Gross was also quoted in a New York Sun newspaper article in January 2006, reproduced on the union's website, which described the IWW union drive at Starbucks, among other IWW initiatives in the New York geographic area. ((Tr. 1085, GC Ex. 40(D)). General Counsel urges that in addition to the evidence above relied on by the ALJ, this timing further justifies an inference of unlawful motive (See ALJD at 82:20-24). Further, the January 2006 Performance Review was implemented in a manner which significantly departed from the norm. Gross noted that for the first time at a performance review, his District Manager (Anders) was present along with his Store Manager (Cannon). Also, for the first time at a performance review, Gross was unexpectedly asked, immediately before the review was administered, to brew coffee

utilizing the "French Press" brewing method.. Gross needed to get confirmation from Cannon as to the exact specifications for brewing before proceeding (Tr.1087). But it should be noted that two of Gross's coworkers nearby were similarly unsure of the exact specifications when he sought their assistance (Tr. 1087). Further, Gross, as well as Sarah Bender, testified credibly that "French Press" is not on the Starbucks menu and that they had never observed a customer ordering one (Tr. 1088, 1299-1300). So, in addition to being a departure from normal performance review procedures, this "test" of Gross seemed clearly to be a deliberate attempt to "catch" Gross unnecessarily with regard to a brewing method rarely encountered. When Gross asked why Anders was present at the review, Cannon initially tried to justify Anders' presence by falsely claiming that the new "policy" was to have District Managers present for reviews where the grade was "exceeds expectations" ("3") or "needs improvement" ("1"). Anders quickly corrected this seemingly reactive misstatement, asserting that it was just a "best practice" to have the "DM" present.

The final flaw in the January 2006 review of Gross, which clearly constituted seizing on a pretext, concerns the comments on his availability and his giving away of scheduled shifts to coworkers. After Gross forcefully argued that the entire review was inaccurate and should be modified upward, Cannon commented that Gross had been giving away his shifts (Tr. 1094). Gross corrected Cannon, noting that after Cannon had raised that issue with Gross sometime between August 2005 and January 2006, Gross had agreed not to give away shifts and had kept his promise. Significantly Cannon did not dispute this when Gross asserted it. (Tr. 1094). Moreover, Anders requested that Gross fill out a new availability form. These forms, which employees can only change at six

month intervals, set the parameters within which Starbucks creates weekly schedules for its employees. They are not scheduled except for days and times within their availability as indicated on the forms. Gross agreed to fill out a new form, but he knew his availability would not change—he had been a full time law student since September 2004 and had changed his availability to weekends only in August 2004 (12-6 p.m. Saturdays and Sundays). Accordingly, Gross asked Anders if he had to change his availability in order to avoid an unfavorable review. Anders told him no, he did not have to, so Gross filled out a new form with the same availability. It is undisputed that Gross had maintained the same 12 hour, weekends-only, availability since August 2004 when he enrolled full time in law school. Moreover, Gross testified that Cannon and Anders knew he was a full-time student since such matters were discussed openly at the store. Despite these uncontradicted facts, the performance review category on page 2 regarding "Maintains regular and consistent attendance and punctuality" references alleged inadequate hours of availability and giving away shifts as justifications for the low "1" rating in that category. That Respondent seized on a pretext in this section of the review to downgrade Gross is also shown by the fact that there was no mention of Gross' availability in his May 2005 review, despite the fact that his availability at that time was exactly the same as in January 2006.

For all of the reasons outlined above, General Counsel submits that The ALJ was correct in finding that Respondent was motivated by anti-union animus in issuing the January 29, 2006 performance review to Daniel Gross.

POINT 5. The ALJ properly found that the April 14, 2006 Performance Evaluation and the April 29, 2006 "Update on Performance" administered to Daniel Gross were issued in retaliation for his union and protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act.

Respondent challenges the ALJ's findings as to the April 14 and April 29 documents, arguing that neither document constituted an "adverse" employment action, and that even if they were adverse, General Counsel failed to show that they were discriminatory because Respondent regularly administers such "updates" to its employees (Resp Br. At 78-82).

As explained below, Respondent's contentions in this regard are factually and legally without merit. On April 14, 2006, Daniel Gross was summoned to a pre-scheduled meeting by James Cannon at the store at 36th Street and Madison Avenue. He had not been notified on January 29, 2006 when he received his performance review that any such subsequent meeting would take place (Tr. 1106). Present for the meeting were James Cannon, Jose Lopez, and Paul Gregorczyk. Cannon introduced Lopez and Gregorczyk to gross as his new Store Manager and District Manager, respectively (Tr. 1107). . Gross had invited fellow union member Ivan Hincapie to serve as his witness. The managers refused to permit Hincapie to stay, and Gross decided to proceed with the meeting anyway (Tr. 1108). Cannon handed Gross a two page horizontal document entitled "Performance Review" (Tr. 1109-1110; GC Ex. 5; GC Ex. 36).[27] Cannon spoke briefly, going over the document. Jose Lopez did not say much, but mentioned something about setting up Gross for "success" (Tr. 1111). None of the managers gave any further

[27] GC 36 is the document as Gross received it, minus the signature page and the extra page with the Additional Comments Section. GC Ex. 5 is the document produced by Respondent pursuant to GC's subpoena *duces tecum*.

explanation about why they had set up this meeting. The document given to Gross entitled "Performance Review," bore the same effective date as the performance review he had received on January 29, 2006. The document was similar but not identical to the one administered on January 29. The ratings and comments were substantially the same as those in the January 29 review in all categories under "Section A—Key Responsibilities" except one. In the category entitled "Maintains regular and consistent attendance and punctuality" the rating was "2" as compared with a "1" in the same category on the January 29, 2006 review. The comments in that section stated that "Dan, as agreed during his last review, has worked all of his shifts as scheduled and has been on time and in dress code on all occasions" (See G.C. Ex. 5 at p. 2). Thus, with the exception of this significant admission, which comports with the testimony of Gross, the April 14 document given to Gross was more or less a rehash of the negative performance review issued on January 29. General Counsel notes that on March 14, 2006, the union had filed an unfair labor practice charge specifically alleging the January 29 review as discriminatory (See GC Ex 1(a)). Gross questioned Cannon at this meeting as to how he could get a favorable rating in the category "Contributing to positive team environment by recognizing alarms or changes in partner morale and communicating them to the management team." When Gross asked if he would have to communicate to management complaints by fellow employees to him about being overtaxed at the bar or about being underpaid, Cannon answered in the affirmative. Cannon explained he could then talk to the employee to figure out what was wrong, or in the case of a complaint about being underpaid, he could see if he could remedy that by helping the employee pick up shifts in other stores. (Tr. 1111-1112) When seen in this context, the April 14 performance

review document must be seen first as an attempt to somehow justify, with the new managers present, the previous performance review given Gross, which itself was clearly discriminatory. In connection with the answers to Gross' questions, Starbucks had essentially transformed at least one of its performance review categories into a vehicle for soliciting grievances in the context of an ongoing union campaign (Tr. 1112). Gross testified that in his capacity as lead organizer for the union since 2004, he had received many complaints by workers about working conditions. (Tr. 1113). Now Gross was being told he would be downgraded on his performance review unless he regularly reported such complaints to managers. Gross was not asking these questions to be facetious. As mentioned, he had filed an unfair labor practice charge because Respondent, in the January 29 review, seemed bent on interpreting the review categories differently than in the past because of his union activities. The answers to his questions just confirmed his suspicions.

For all of the reasons discussed above, the April 14 performance review document was simply a continuation of the discriminatory review issued to Gross on January 29. The ALJ so found, and noted another factor undermining Respondent's claim that this was simply a neutral "update" administered to somehow "assist" Gross, or to "set him up for success." As noted above, there are two versions of this document in evidence (G.C. 5 and G.C. 36). Gross was presented with the version (G.C. 36) which omitted the last page "additional comments" section containing supposed recommendations for improved performance. The ALJ properly reasoned that if the true purpose of this updated "review" was to provide an opportunity for improvement, there was no valid reason for failing to provide Gross with feedback on how to improve (ALJD

69: 43-48). Also in this regard, the ALJ noted that the same document upgraded Gross in the category of attendance and punctuality based on his working all scheduled shifts. This is consistent with Gross' testimony that he did work all his scheduled shifts and further consistent with his credited testimony that District Manager Anders told him he would not have to increase his availability to receive an improved performance rating. Based on the above contradictions and on the fact that Gross was never informed, either verbally or in writing, that he was required to increase his availability, the ALJ properly concluded that Respondent would not have administered the April 14 document in the absence of his protected conduct (ALJD 70:10-17).

The ALJ similarly found that the "Update on Performance" document, dated April 27 and given to Gross on April 29, 2006, was discriminatorily motivated (GC Ex. 6). Respondent's claim that this document is not an adverse employment is meritless, inasmuch as the document, by its terms, states that Gross will be terminated if he does not improve in certain areas. The entire document reads like a disciplinary memo, and inexplicably was administered less than two weeks after the April 14 rehash of Gross' January performance review. When one examines the record evidence and testimony, particularly with respect to Lopez, the conclusion is inescapable that this document was issued for no other reason but to pave the way for Gross' unlawful discharge. First, Lopez admitted in his testimony that the issuance of such a document, in the form that it was issued to Gross, was virtually unprecedented in his many years as a store manager (Tr. 282-283). Lopez's exact words on this point are telling: he admitted that this was a "crazy situation" and I don't recall having to be in a situation with having to draft" this type of document (Tr. 283). Lopez's testimony amounts to an admission that Gross was

singled out for this type of formal memo. The memo, threatening discharge in the wake of one negative performance review, was clearly not the norm, which Lopez testified in his experience would instead have been informal oral counseling on performance (Tr. 283-284). This testimony, regarding Respondent's significant departure from the norm, contradicts Respondent contentions that this was just an ordinary monitoring of an employee who had received a "needs improvement" performance rating. As such it is strong evidence that Respondent was discriminatorily motivated when it issued the document to Gross. Moreover, Lopez's initial testimony that the April 29 memo was his and his alone, and was based on his own observation of Gross, is suspect, for several reasons. (Tr. 280-281). It is undisputed that Lopez was present for only three shifts with Gross from the time he first met Gross on April 14, 2006 to the time he administered the April 29 memo (Tr. 1727-1728, GC Exs. 80, 81). . Lopez's logbook was introduced into evidence and has entries for those three dates: April 15, April 22, and April 23 (See G.C. Ex. 4, at "4/15/06"; "Sat 4/22"; "4/23/Sun"). On April 15, Lopez recorded his interactions with Gross on their first shift together. The first topic mentioned on 4/15 with respect to Gross references are a discussion between Lopez and Gross wherein Lopez reminded Gross that his beard should be neat according to the dress code. On Saturday April 22, the next shift with Gross, Lopez'e entry reads as follows: "Dan worked 12-4, arrived clean shaven and seems (acts) very positive. It stated further that Dan displayed good customer service skills and sampled pastries. Lopez acknowledged that those notes were his positive review of gross' performance on that shift (Tr. 1723, 2369). The only notation regarding Gross with respect to April 23, the next day Lopez worked with him, concerned Lopez's observations of Gross interacting with his co-

worker Charles. The very next time Lopez worked with Gross was April 29, and Lopez admitted that he administered the April 29 Update on Performance at the beginning o f the shift that day (Tr. 1728, 1730). As noted, Lopez contended that he drafted the April 29 memo based on his assessment of Gross' performance between April 15 and April 29, but conceded that the above-described three shifts were the only ones on which worked with Gross during that short period (Tr. 1727-1728). His testimony is not credible. Given that: (1) Lopez specifically took notes regarding his interactions with Gross on those days; (2) that there were only three shifts in total; (3) that those were the first three shifts Lopez had ever worked together with Gross; and (4) that Lopez commented favorably on Gross' performance for one of those shifts (April 22), it is inconceivable that he could have truthfully arrived at the conclusions outlined in the April 29 memo. In particular, the sentence "to date, I have not seen marked improvement...." does not square with Lopez's praise for Gross on April 22 and the lack of any negative notations in Lopez's log for the only other two days they had worked together. The ALJ took all of the above into account in finding that the Update did not comport with Lopez's generally positive observations in his log, wherein "there is not one instance where Lopez noted inadequate performance in any of the areas outlined in the Update" (ALJD 72:25-40). Further, the memo persists in drawing a purported connection between Gross' alleged shortcomings and his inadequate "attendance record." This assertion, in a document given to Gross on April 29 and drafted before that date, flies in the face of the April 14 performance review document wherein Cannon conceded that Gross had already improved in the area of attendance by working all of his shifts as scheduled. The Update memo clearly was designed not to "set you up for success" but rather to set up Gross for

his ultimate discharge. The document appears to instruct Gross to improve his availability "or else, " even though Anders, in January 2006 at his review, assured Gross that he did not have to do so in order to avoid a negative review. Respondent knew full well that Gross was a full time law student, who would not be able to significantly change his availability until he graduated[28]. Yet the memo presages his discharge by stating that failure to improve in the areas indicated, by the end of July 2006, "**will** result in the termination of your employment at Starbucks" [emphasis added].[29] Based on the all of the above, the ALJ correctly concluded that this Update memo was "pretextual, and accordingly, constitutes persuasive evidence of Respondent's unlawful motive with regard to its future actions toward Gross" (ALJD 72: 42-48; see also ALJD 82: 33-37).

POINT 6. The ALJ correctly found that Respondent, on August 5, 2006, issued a corrective action disciplinary memo to, and discharged Daniel Gross, in retaliation for his union and protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

The evidence in the record of this case overwhelmingly supports the conclusion that Respondent fired Daniel Gross because of his prominent, persistent union and other protected concerted activities in his capacity as the primary organizer and spokesperson for the IWW Starbucks Union.

As noted above, Respondent opposed the union's organizational drive right from the beginning, and in fact stipulated that it was aware of Gross's activities beginning in May 2004 (Tr. 1057). It is clear beyond doubt that much if not all of Gross' activities

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[28] Inasmuch as Gross began as a full time law student in the fall of 2004, he would not normally be expected to graduate law school until Spring 2007 at the earliest, assuming continuation of his full time status.

[29] In addition to the fact that it is hard to believe that the same person who made the logbook entries also drafted the April 29 memo, Lopez, when pressed later in his examination, conceded that he had "ran it by" Traci Wilk of Partner Resources (Tr. 1741-1742).

were known to Respondent, because he engaged in some of those activities in full view of managers in front of various Starbucks stores, and because the union was and still is intent on publicizing the organizational drive at Starbucks through its website and through contacts with other media outlets, including but not limited to such mainstream outlets as the New York Times and the Wall Street Journal.

Respondent, however, in its exceptions, argues that despite its obvious knowledge of Gross's open and notorious union and protected concerted activities, the General Counsel did not establish a *prima facie* case that his discharge was motivated by unlawful considerations. In this regard, Respondent appeared to concede that the record evidence regarding its communications and conduct in response to anticipated and actual union activity show general animus, as noted above (ALJD 81: 24-28). But Respondent asserts that there is no nexus between the decision to fire Gross and his union activities. In this regard, Respondent relies on its contentions that Jose Lopez did not harbor animus against Gross, and that no animus can be inferred from the timing of Gross' discharge (Resp. Br. At 58-61). Respondent is wrong on both counts, as cogently explained by the ALJ in her decision.

The testimony and written words of Jose Lopez provide ample direct evidence that Respondent's discharge was retaliatory. As noted above, Lopez was involved in administering the discriminatory performance review and update on performance memos on April 14, 2006 and April 29, 2006 respectively. In May 2006, it came to the attention of Lopez that Gross had been telephoning two other employees of the 36th street and Madison store at home after work to discuss union activities (See GC Ex. 4, at "5/10/06"; Tr. 315-318; 1136-1138; 1735-1737; 2329-2331) Lopez specifically

admitted that Willy Dominguez and Jenny Robateau informed him that Gross had phoned them outside of work to invite them to union meetings. Lopez claimed that the employees had told him they felt uncomfortable about those contacts (Tr. 316). Robateau, however, while corroborating Lopez that she told him about Gross' contacting her outside of work about the union, testified that she told Lopez it was "okay, just a little annoying" (Tr. 2330). Robateau further testified that it was Lopez who instructed her to fill out an incident report about the calls (Tr. 2331). On May 13, 2006, based on this information from Dominguez and Robateau, Lopez admittedly called Gross aside to reprimand him. Gross recalls Lopez. telling him on that occasion that he was not to call Starbucks workers on the phone anymore to talk about Starbucks, and that if Gross persisted, they "would be right back there again." (Tr. 1136-1137).

First, as found by the ALJ, Lopez's directive to Gross on that date constitutes an independent violation of Section 8(a)(1), in that he coercively interfered with employees' lawful Section 7 rights by prohibiting employees from discussing the union or work matters while off duty (ALJD 73:19 through ALJD 74: 46). The ALJ correctly relied on this unfair labor practice in finding that in fact Lopez did harbor animus towards Gross' protected activities (ALJD 82: 29-33). Secondly, it was Lopez who administered the April 29 "Update on Performance", which as noted above, the ALJ found to constitute persuasive evidence of animus (ALJD 82: 33-37). The ALJ did not credit Respondent's witnesses that Lopez singlehandedly made the decision to fire Gross. But this is of no moment, as the ALJ also correctly noted, inasmuch as the evidence evinces substantial animus against Gross, "whether this emanated from Lopez individually or Respondent institutionally" (ALJD 82: 33-35). The ALJ noted additionally that in the

instant case, General Counsel has proven the commission of substantial unfair labor practices, some of which were directed at Gross, a further fact supporting a *prima facie* case that Gross' discharge was motivated by anti-union animus.

On the issue of timing, the ALJ discussed the evidence showing the union's escalation of union activity beginning particularly in November 2005, and properly concluded, in agreement with the General Counsel, that this escalation of activities corresponded to the timing of the downgrading of Gross' performance, further supporting General Counsel's *prima facie* case. (ALJD 61:24 through ALJD 62: 5; ALJD 82:20-24).

Respondent asserts additionally that even if the General Counsel established a prima facie case, the ALJ erred in finding that Respondent failed to satisfy its burden under *Wright Line*. In summary, Respondent contends that Gross was a subpar employee who had limited availability, who further committed acts of insubordination, and who sought to undermine managers' authority and store morale. According to Respondent, it would have fired him for those asserted reasons even absent his protected activities (Resp. Br. At 61-68). Taking the second argument first, the ALJ correctly found that there is simply no record evidence to support Respondent's contentions that Gross was ever insubordinate, or that he ever refused to follow work instructions or engaged in any misconduct while on the job (ALJD 83:2-8). Regarding the asserted attempts to undermine authority and morale, as noted by the ALJ, Respondent pointed to two isolated examples: brief conversations that Gross assertedly engaged in with coworkers, which themselves were protected because they involved terms and conditions of employment. (Resp. Br. At 64-66; ALJD 75: 1-11). As the ALJ quite correctly concluded, there is no evidence in the record that Gross ever sought to prevent any employees from completing

their tasks or that he otherwise interfered with their work assignments (ALJD 83: 45 to ALJD 84:21). In addition, the ALJ properly noted that to the extent Respondent relies on such brief workplace conversations involving terms and conditions of employment to support its defense, this reliance evinces an unlawful motive, rather than supporting Respondent's *Wright Line* defense to Gross' discharge (ALJD 84: 2-6).

Regarding Respondent's persistent claim that one of the non-discriminatory reasons for Gross' discharge was his lack of availability, the ALJ, in agreement with General Counsel, concluded that this asserted reason, as demonstrated above, was clearly pretextual. In this regard, the ALJ noted that Gross received an upgrade to "meets expectations" in his April 14 Review despite the fact that his availability had not changed. Respondent never presented to Gross any written recommendation that he increase his availability, Rather, he was specifically told by Anders at the January 29 review that he need not increase his availability to receive a better performance rating. Respondent also admitted that it approved all of Gross's requests for time off even after the January review.

General Counsel urges that the following record evidence further supports the ALJ's conclusion that the asserted reason of unavailability and lack of hours was a pretext. No evidence was ever adduced that Respondent has any rules requiring any specified minimum availability or a specific minimum number of hours which must be worked each week, on pain of discipline. Jose Lopez specifically confirmed that there were no such minimums and that it was generally Starbucks policy to provide flexible part time hours. (Tr. 255, 261). Lopez also conceded that he had employees other than Gross who juggled school and work. For example, Monica Thompson was one such

person, .who also had limited availability. Thompson worked at the same store as Gross and was also a full time student. In fact, Thompson, during the school year months of September 2005 through May 2006, worked only 56 shifts in total, which on a weekly basis comes out to about an average of 1.5 shifts per week (See GC Ex. 79A). Yet there is no evidence that Thompson was subject to any discipline for maintaining this schedule because of her student status. . Thompson left the company voluntarily and was rated as eligible for rehire (See GC Ex. 79C). Clearly the example of Thompson, in the same store, during the same time period and with the same store manager as Gross, establishes that he was treated disparately with respect to hours and availability. Moreover, Jenny Robateau, also in the same store, notably testified that she was not pro-union (Tr. 2343-2344). Robateau also noted that her availability sheet reflected her needs having to do with her school status. In fact, she was even permitted by Lopez because of her school status to go off the schedule at 36th and Madison during 3 months of the summer of 2006, without any formal paperwork or request for leave, and was permitted to work at another Starbucks on Long Island during that period. (Tr. 2334-2335) In the summer of 2007 she was permitted to take leave to travel to Denmark to study for 4-5 weeks (Tr. 2334). Suffice it to say that the store at 36th and Madison under Jose Lopez during 2005-2007 was a very flexible and accommodating place to work if you were a student, so long as your name was not Daniel Gross. The testimony of Sarah Bender provides further support for the proposition that Gross was singled out for disparate treatment with respect to sufficient availability and working enough shifts per week. Bender, beginning in April 2007, with full knowledge of her manager, worked just 2 shifts per week for 8-11 hours (Tr. 1297). . She recalled a co-worker named John Malone who just worked Sundays (Tr.

1297-1298). . Her other co-worker Rebecca Tisby worked only 1-2 shifts per week for most of the spring and summer of 2007 (Tr. 1298-1299).

Another key point which demonstrates the pretextual nature of Respondent's defense concerns the admission mentioned above by James Cannon in the April 14 horizontal performance review document (GC Ex. 5, 36). . As noted, Cannon actually upgraded Gross in the one category of maintaining regular attendance and punctuality. He did so because he acknowledged that Gross, as he has testified consistently, appeared for all his scheduled shifts since the January review. In this regard, Lopez, when examined by General Counsel as an adverse witness, readily agreed with the proposition that an employee would deserve a "2" or "ME" in the category on "maintains regular and consistent attendance and punctuality" if the employee came to work on all scheduled shifts, was punctual and was consistent in doing that (Tr. 295). Lopez also agreed that Daniel Gross was the only employee who he ever gave a "1" or NI" to in the category who actually came to all their scheduled shifts, and was consistently on time. Despite that apparent admission, and the provable fact that Gross worked an even higher percentage of the shifts within his availability after April as compared with before that time, Gross was inexplicably downgraded from the "2" grade given him by Cannon in April to a "1" grade in his final performance review (GC Ex. 42 at p. 1)[30]. The false explanation for the downgrade was that Gross had been expected to expand his availability and had specifically been expected to work on both weekend days. It is clear from all of the credible record testimony that Gross had never been told of any such expectations. So

[30] Gross worked 10 shifts during the 3 month period of February through April 2006: he worked almost twice as many, 18 shifts, during the last 3 months of his employment—the months of May through July 2006 . See GC. Ex. 81.

Gross was downgraded in this particular category based on blatant falsehoods, a fact that further supports an inference of discriminatory motive.

Finally, the ALJ properly emphasized that there is no documentation in any performance reviews, or other probative record evidence, establishing that hours of work or availability affected Gross' ability to prepare drinks or serve customers. For all of these compelling reasons, the ALJ correctly concluded that lack of hours or availability was not one of real reasons for Gross's termination (ALJD 83: 18-33).

Finally, there is the matter of Gross' final Performance Review, issued to him on August 5, 2006. As noted by the ALJ, Respondent relies on this in significant measure in support of its defense that it discharged Gross for non-discriminatory reasons. But as correctly noted by the ALJ, the final Performance Review in and of itself is direct evidence of animus towards Gross. In large part, as found by the ALJ, that is because in the areas mentioned in the Review where Gross' performance was found to be lacking, Respondent cited his union and protected activities in support of those conclusions (ALJD 84: 8-29).

In this regard, Jose Lopez admitted that the union solicitations he warned Gross about on May 13 were in his view directly connected to the downgrading of Gross on the last performance review in the category of creating a good work environment (See GC Ex. 4, at "5/13/06"; and Tr. 1736, 1738). This admission constitutes direct evidence that Respondent downgraded Gross on his performance reviews because of his lawful union and protected union activities. Lopez asserted responsibility for preparing Gross's final performance review, which as noted above, Respondent asserts was a prime causative factor in his discharge. Lopez's testimonial admissions that Gross's union solicitations

did not "create a good working environment" have a clear nexus to language used in his final performance review as well. On that review (See GC Ex. 42 at page 1, "Key Responsibilities") the third category is entitled in part—"Acts with Integrity, honesty, and knowledge that promotes the culture value and mission of Starbucks." Lopez used similar language in the comments section of this category to that which he used in describing his May 13 reprimand of Gross. In the final review, the third category box comments that, among other things, Gross does not "actively contribute to a positive store environment." Thus, it seems clear that Respondent was referring to Gross's protected activity in downgrading him with a "1" rating in this category. General Counsel submits that this reflects Respondent's extreme animus towards Gross and is a tacit admission by Respondent that Gross'union and other protected activities are simply incompatible with the "culture, values and mission of Starbucks."

In any event, any doubts on this matter were dispelled by Lopez when he was asked directly why Respondent made the decision to discharge Gross. Lopez testified that it was because of Gross' "overall attitude." Lopez made this point twice during his testimony (Tr. 297, 304). As discussed *supra,* and as found by the ALJ in connection with the reference's to Gross's attitude on his January 29, 2006 review and on the April 14 Performance Review , the Board has consistently held that comments about an employee having a bad "attitude" are considered to be a veiled reference to the employee's protected activities. Further, as here, where such comments are made in explaining why an employee was discharged, it constitutes "especially persuasive evidence" that the discharge was unlawfully motivated. *Children's Studio School, Public*

Charter School, *supra*, 343 NLRB 801, 805, citing *Cook Family Foods*, 311 NLRB 1299, 1319 (1993).

Respondent's unlawful "corrective action" disciplinary memo issued to Gross in connection with the July 15, 2006 incident involving District Manager Alison Marx is another example supporting the conclusion that the final Performance Review itself revealed Respondent's animus. As correctly found by the ALJ, Respondent, by imposing discipline for that incident, during which Gross was engaged in a peaceful, protected, union protest, independently violated Section 8(a)(1) and (3) of the Act (ALJD 78:10-44). As demonstrated above, the finding of the ALJ that the corrective action discipline for the Alison Marx incident was unlawful is further evidence of animus towards Gross in and of itself. But even more telling is how the corrective action for this incident was utilized in the final Performance Review of Gross. Respondent's specific reference to this incident in two separate categories of the final Performance Review show the extent to which Respondent viewed Gross' protected activities as incompatible with "Core Starbucks Competencies." [31] The corrective action for the Alison Marx incident was specially mentioned as direct support for low ratings in two categories on the review in Section B-- "Core Starbucks Competencies." The final performance review, supposedly drafted by Lopez, contains an extra page with comments explaining the rationale for the ratings in Section B (GC Ex. 42, at p. 4). . For example, the Marx incident is cited specially as supporting the low "1" rating given Gross in the category "Ethics and Integrity". The corrective action and incident is mentioned immediately

[31] The fact that Gross was given the corrective action discipline regarding the Alison Marx incident at the same time as he was given his final performance review on August 5, 2006, when he was fired, suggests that the discipline was imposed for discriminatory reasons, namely to bolster and further justify his dismissal.

following the comment that Gross does not demonstrate a commitment to Starbucks values, beliefs, and principles. The same incident is cited again as support for the low "1' rating in the category "Decision Making, " following the comments that Gross does not demonstrate the level of experience and judgment expected of a partner of his tenure. Taken together, this placement of the corrective action regarding the Marx incident in two different places on the review is an admission that Respondent viewed Gross' union and protected activities as explicit grounds for finding his protected concerted conduct as inconsistent with the company's values and principles and therefore as justification for discharge. Additionally, as noted by the ALJ, Traci Wilk, the Director of Partner Resources, admitted that the Marx episode was one of the incidents which led to Gross's discharge (ALJD 81:1-5; Tr. 510, 1760-1761).

Based on all of the above, the final Performance Review constitutes evidence of further animus, rather than serving as support for Respondent's contentions that it would have discharged Gross for non- discriminatory reasons even absent his protected activity. Accordingly, for all of the reasons advanced above, the ALJ was correct in finding that Respondent discharged Gross in violation of Sections 8(a)(1) and (3) of the Act.

CONCLUSION

For all of the reasons outlined above, General Counsel urges that Respondent's contentions in its Exceptions and Brief in Support of Exceptions are without merit The ALJ properly found that: (1) Starbucks' policy prohibiting employees from wearing more than one union pin violated Section 8(a)(1) of the Act; and (2) Starbucks discriminatorily discharged its employees Isis Saenz, Joe Agins, and Daniel Gross because of their union and protected activities, in violation of Sections 8(a)(1) and (3) of

the Act. The Administrative Law Judge's decision, findings and conclusions of law and recommended remedy should be adopted in their entirety.

Dated at New York, New York
This 8th day of May, 2009

Respectfully submitted,

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CERTIFICATION OF SERVICE

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